

FEDERAL PROCEDURAL FORMS

FOR USE IN

CIVIL AND CRIMINAL ACTIONS, BANKRUPTCY PROCEEDINGS,
SUITS IN THE COURT OF CLAIMS, ADMINISTRATIVE
PRACTICE BEFORE IMPORTANT BOARDS AND
COMMISSIONS, AND ALL APPEALS
PERTAINING THERETO

ANNOTATED

By

ALEXANDER HOLTZOFF
Special Assistant to the Attorney-General

and

ALLEN R COZIER
Special Attorney, Department of Justice



IIPA LIBRARY



3999

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

~~\$10.00~~
~~45/-~~
Metropolitan.

Copyright, 1940

By THE BOBBS-MERRILL COMPANY

PREFACE

The adoption of the new Federal Rules of Civil Procedure gave rise to a growing need for a complement of forms essential in practice before the District Courts of the United States. One of the purposes of the new rules was to promote brevity and simplicity in pleadings. Due to the procedural changes made by the rules, many of the forms in use prior to September 16, 1938 became obsolete and others needed revision.

During the two years that have elapsed since that date, the courts have rendered hundreds of decisions, interpreting, construing, and applying the rules. With the benefit of these decisions it is believed that a new book of federal forms now may be presented which will reflect the judicial attitude toward the rules as well as the spirit in which they were promulgated.

The book thus prepared and presented to the bar for its approval, is arranged along the following general lines: First, the form is set out; second, authors' notes, cross-references, and statutory references; third, the Rule or Rules of Civil Procedure applicable to the particular form and comments of the Advisory Committee; fourth, annotations of general application to the form, rules and applicable statute.

It was not intended to include in this volume an exhaustive collection of forms for every conceivable situation. Rather it has been our aim to present those necessary for all ordinary purposes together with such material as will enable the pleader to adapt them to his particular needs. The attorney should be on guard to comply with the provisions of the local rules in the several districts.

It has been the aim of the authors not to confine this work to civil actions proper, but to extend it to criminal and bankruptcy proceedings and suits in the Court of Claims as well. The rising importance of administrative law made it advisable to include forms for proceedings to review orders of quasi judicial bodies, omitting however such forms as are prescribed officially and furnished in printed form by the agencies themselves. Forms for use in the highly specialized branch of admiralty law also were omitted.

The authors wish to acknowledge their obligation to their many friends and associates who have assisted them so generously with their counsel and advice. Gratitude is due particularly to Messrs. William W. Barron, Bart W. Butler, Elmer B. Collins, Ernest E. Danly, Fred K. Dyer, Frank J. Ready, Andrew D. Sharpe, Abner J. Swanson and William S. Ward and Miss Zelpha C. Brookley of the Department of Justice; George B. Porter, Esq., of the Federal Communications Commission; Henry G. Fischer, Esq.,

of the Securities and Exchange Commission; and Leland L. Tolman, Esq., of the staff of the Advisory Committee on Rules for Civil Procedure.

The authors and publishers especially wish to thank the American Bar Association for its courtesy in granting permission to use as introductory statements some excerpts from a book written by Mr. Holtzoff entitled "New Federal Procedure and the Courts," published and copyrighted by the American Bar Association.

Although the authors have endeavored sincerely to reach the unattainable ideal of accuracy, they have a full realization of their own limitations. They will be grateful for advice as to any errors discovered or as to any additional material which by its insertion would improve the usefulness of the book.

ALEXANDER HOLTZOFF
ALLEN R. COZIER

Washington, D. C.
November 15, 1940

TABLE OF CONTENTS

Part One

CIVIL ACTIONS

CHAPTER 1

CAPTIONS

Form

1. Individuals.
2. Partners.
3. Unincorporated associations.
4. Corporations.
5. Executors and administrators.

Form

6. For the use of another.
7. Under a statute of the United States for the use of another.
8. Next friend.
9. Guardians.

CHAPTER 2

SUMMONS

Form

15. Summons.
16. Motion for special appointment of person to serve summons.
17. Order of special appointment
18. Marshal's return of service upon an individual.
19. Affidavit of service upon an individual by a person specially appointed.
20. Affidavit of service upon a corporation, partnership, or unincorporated association.
21. Affidavit of service upon the United States.
22. Affidavit of service upon an officer or agency of the United States.
23. Affidavit of service upon a corporation which is an agency of the United States.
24. Affidavit of service upon a state or municipal corporation.
25. Motion for order for service upon absent defendant in action involving title to property.

Form

26. Affidavit for order for service upon absent defendant in action involving title to property.
27. Order for service upon absent defendant in action involving title to property.
28. Affidavit of personal service of order on absent defendant in action involving title to property.
29. Affidavit of personal service of order on person in possession in action involving title to property.
30. Motion for service by publication.
31. Affidavit for order for service by publication on absent defendants.
32. Order for service by publication on absent defendants in action involving title to property.
33. Proof of publication of order in lieu of summons in action involving title to property.

TABLE OF CONTENTS

CHAPTER 3

GUARDIAN AD LITEM

Form

- 40. Application for appointment of a guardian ad litem.
- 41. Order appointing guardian ad litem.
- 42. Petition by plaintiff for appointment of a guardian ad litem for an infant defendant.

Form

- 43. Petition by infant defendant for appointment of guardian ad litem.
- 44. Notice of hearing on petition for appointment of guardian ad litem.
- 45. Consent to serve as guardian ad litem and acknowledgment.
- 46. Order appointing guardian ad litem.

CHAPTER 4

COMPLAINTS

SECTION 1

PLEADING AND PRACTICE IN GENERAL

Form

- 55. Affidavit in forma pauperis.

Form

- 56. Order of court in forma pauperis.

SECTION 2

ALLEGATIONS OF JURISDICTION

A. Diversity of Citizenship and Amount in Controversy

Form

- 59. One individual against one individual.
- 60. One individual against a corporation.
- 61. One individual against two individuals who are citizens of the same state.
- 62. One individual against two individuals who are citizens of different states.
- 63. Two individuals who are citizens of the same state against two individuals who are both citizens of another state.

Form

- 64. Two individuals who are citizens of different states against two individuals who are citizens of the same state.
- 65. One individual against a partnership.
- 66. A partnership against a corporation.
- 67. A citizen against an alien individual.
- 68. An alien corporation against a citizen.

B. Federal Question and Amount in Controversy

Form

- 69. Under the Constitution of United States.
- 70. Under a law of the United States.

Form

- 71. Under a law of the United States not requiring jurisdictional amount.
- 72. Under a treaty of the United States.

TABLE OF CONTENTS

vii

C. Action by the United States

Form

73. United States suing in own name.

Form

74. Action by an officer of the United States authorized by law to sue.

D. Action against the United States

75. Proceeding under the Tucker Act.

SECTION 3

CLAIMS FOR RELIEF

Form

78. Complaint on a promissory note.
79. Complaint on an account.
80. Complaint for goods sold and delivered.
81. Complaint for money lent.
82. Complaint for money paid by mistake.
83. Complaint for money had and received.
84. Complaint for breach of contract.
85. Complaint for negligence.
86. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C.D. or E.F. or whether both are responsible and where his evidence may justify a finding of wilfulness or of recklessness or of negligence.
87. Complaint for conversion.
88. Complaint for specific performance of contract to convey land.
89. Complaint on claim for debt and to set aside fraudulent conveyance under Rule 18 (b).
90. Complaint for negligence under Federal Employer's Liability Act.
91. Complaint for damages under Merchant Marine Act.
92. Complaint for infringement of patent.
93. Complaint for infringement of copyright and unfair competition.
94. Complaint for interpleader and declaratory relief.
95. Complaint for declaratory judgment.
96. Complaint under the Tucker Act for breach of contract.
97. Complaint to foreclose a mortgage in jurisdiction in which a mortgage is a conveyance.

Form

98. Complaint to foreclose a mortgage in jurisdiction in which a mortgage is a lien.
99. Complaint to restrain violations of a negative covenant.
100. Complaint by subcontractor for labor and material under the Heard Act.
101. Complaint by trustee in bankruptcy to set aside fraudulent conveyance.
102. Complaint for negligent manufacture and distribution of a dynamite cap.
103. Complaint for unfair competition.
104. Complaint against owner of car for injuries negligently inflicted.
105. Complaint in stockholders' representative suit in behalf of corporation.
106. Complaint to annul a contract for fraud.
107. Complaint for rescission of a contract on the ground of mistake.
108. Complaint by United States for collection of taxes.
109. Complaint against collector for refund of taxes illegally collected.
110. Complaint against the United States on a contract of government life insurance.
111. Complaint to cancel certificate of citizenship for establishing permanent residence abroad.
112. Complaint for cancelation of certificate of citizenship for fraud in its procurement.
113. Payee against maker of a promissory note.
114. Negligent driving.
115. Lord Campbell's Act.
116. Injunction and damages for infringement of patent.
117. For rent.

TABLE OF CONTENTS

SECTION 4

SPECIAL ALLEGATIONS

Form	Form
120. Capacity to sue.	124. Omission of parties.
121. Conditions precedent.	125. Loss of employment in action for libel.
122. Official documents and acts.	126. Loss from inability to resell goods.
123. Judgments and orders.	

CHAPTER 5

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Form	Form
135. Temporary restraining order and order setting down application for preliminary injunction for hearing.	144. Order restoring preliminary injunction pending appeal.
136. Temporary restraining order and rule to show cause for preliminary injunction.	145. Order denying motion to set aside judgment for injunction.
137. Temporary restraining order and rule to show cause for preliminary injunction (Alternative form).	146. Final order denying injunction and dismissing complaint.
138. Security for restraining order.	147. Restraining provisions for inclusion in injunction.
139. Temporary restraining order granted without notice.	(1) Patent infringement.
140. Motion for preliminary injunction.	(2) Trade-mark infringement.
141. Notice of motion for preliminary injunction.	(3) Copyright infringement.
142. Order denying motion for preliminary injunction.	(4) Unfair competition.
143. Notice of motion to vacate or modify preliminary injunction.	(5) Negative covenant in contract for services.
	(6) Negative covenant running with the land.
	(7) Nuisance.
	(8) Prosecution of another suit.
	(9) Ultra vires transaction.

CHAPTER 6

RECEIVERS

Form	Form
160. Notice of motion for appointment of receiver.	166. Motion for appointment of attorney for receivers.
161. Motion for appointment of receiver for mortgaged property.	167. Order appointing attorney for receivers.
162. Order appointing receiver in ex parte proceeding.	168. Order making allowances in receivership.
163. Order appointing receiver for corporation.	169. Motion by receiver for final discharge.
164. Order appointing receiver in adversary proceeding.	170. Order allowing final account and discharging receiver.
165. Order appointing receiver to collect rents.	

CHAPTER 7

NE EXEAT

- | | |
|--|----------------------------------|
| Form | Form |
| 180. Motion for writ of ne exeat. | 182. Order for writ of ne exeat. |
| 181. Affidavit in support of a writ of ne exeat. | 183. Writ of ne exeat. |

CHAPTER 8

REMOVAL OF CAUSES

- | | |
|---|---------------------------------------|
| Form | Form |
| 190. Notice to adverse party. | 194. Motion to remand removed cause. |
| 191. Petition for removal—Diversity of citizenship. | 195. Notice of motion to remand. |
| 192. Order of removal. | 196. Order denying motion to remand. |
| 193. Removal bond. | 197. Order granting motion to remand. |

CHAPTER 9

DEFENDANT'S MOTIONS AND ANSWERS

- | | |
|---|--|
| Form | Form |
| 205. Motion for security for costs. | 219. Order dismissing complaint. |
| 206. Order requiring security for costs. | 220. Motion joining several defenses. |
| 207. Bond for costs. | 221. Answer presenting defenses under Rule 12 (b). |
| 208. Motion to strike. | 222. Answer to complaint set forth in Form 83, with counterclaim for interpleader. |
| 209. Notice of motion (Alternative Form). | 223. Motion for leave to present counterclaim by supplemental pleading. |
| 210. Order striking redundant matter from pleading. | 224. Motion for leave to amend answer to set up counterclaim. |
| 211. Motion for more definite statement. | 225. Denial of existence of a corporation. |
| 212. Order for more definite statement. | 226. Denial of assignment of claim. |
| 213. Motion for bill of particulars. | 227. Denial that party is executor. |
| 214. Order for bill of particulars. | 227. Denial of partnership. |
| 215. Motion to strike pleading for failure to obey order for bill of particulars. | 229. Denial of guardianship. |
| 216. Order striking pleading for failure to obey order for bill of particulars. | 230. Denial of capacity of unincorporated association. |
| 217. Objections to interrogatories. | 231. Denial of capacity of receiver to be sued. |
| 218. Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under Rule 12 (b). | |

CHAPTER 10

AFFIRMATIVE DEFENSES

- | | |
|---|---------------------------------------|
| Form | Form |
| 240. Assumption of risk. | 243. Negligence on part of plaintiff. |
| 241. Accord and satisfaction—Amount in dispute. | 244. Contributory negligence. |
| 242. —Unliquidated amount. | 245. Discharge in bankruptcy. |
| | 246. Duress. |

TABLE OF CONTENTS

Form	Form
247. Illegality.	270. —Sale of goods.
248. Injury by fellow servant.	271. —Performance not within a year.
249. Arbitration and award.	272. —Consideration of marriage.
250. Agreement to arbitrate.	273. —To answer for debt of another.
251. Fraud—Contract procured by fraud.	274. Payment by check which plaintiff failed to present.
252. —Reliance on representations.	275. Liability limited by contract.
253. Estoppel.	276. Act of God.
254. Failure of consideration—Plaintiff without title to property bargained for.	277. Release of surety by alteration of contract.
255. —Destruction of goods prior to delivery.	278. Usury.
256. Laches.	279. Tender.
257. License.	280. Ultra vires of corporation.
258. Payment.	281. Infancy of defendant.
259. Release.	282. Unconstitutionality of statute.
260. Res judicata.	283. Champerty or maintenance.
261. Rescission of contract.	284. Assignment colorable for federal jurisdictional purposes.
262. Extension of time of payment.	285. Waiver.
263. Novation—Note given.	286. Performance prevented by plaintiff.
264. —Mutual exchange of credits.	287. Adverse possession.
265. Failure of performance of condition precedent.	288. Rescission.
266. Limitation of actions in contract.	289. Libel and slander—Truth.
267. Statute of frauds—Promise by executor or administrator.	290. —Privilege.
268. —Relating to lands.	291. Release of surety upon alteration of contract.
269. —To pay debt discharged in bankruptcy.	292. Election of remedies.
	293. Statute of limitations.

CHAPTER 11

THIRD-PARTY PRACTICE

Form	Form
300. Motion to bring in third-party defendant.	303. Ex parte order granting leave to serve third party.
301. Order granting leave to serve third party.	304. Third-party summons.
302. Order denying leave to bring in third-party defendant.	305. Third-party complaint.

CHAPTER 12

PARTIES

Form	Form
315. Motion by plaintiff for leave to summon additional defendant.	320. Motion by defendant for summons of additional defendant.
316. Order directing plaintiff to summon additional party.	321. Order granting leave to summon additional party.
317. Motion for summons of additional party defendant.	322. Motion to add a party defendant.
318. Order for summons of additional party.	323. Motion by plaintiff in foreclosure to add lienor.
319. Motion for summons of additional party.	324. Order adding party defendant.
	325. Motion to drop a party defendant.
	326. Order dropping party defendant.

TABLE OF CONTENTS

xi

Form	Form
327. Motion for substitution for deceased party.	334. Order of dismissal for failure of substitution for deceased party.
328. Notice of motion.	335. Suggestion of death of party.
329. Order substituting another for a deceased party.	336. Motion to allow action to be continued against the representative of an incompetent defendant.
330. Motion by plaintiff's executor to be substituted as party plaintiff.	337. Order allowing action to be continued against representative of incompetent defendant.
331. Order substituting executor of plaintiff's estate as party plaintiff.	338. Motion to substitute transferee of interest.
332. Motion by defendant's administrator to be substituted as party defendant.	339. Order substituting transferee of interest as party defendant.
333. Order substituting administrator of deceased defendant's estate as party defendant.	340. Motion to substitute successor of public officer.
	341. Order substituting successor of public officer as party defendant.

CHAPTER 13 INTERVENTION

Form	Form
350. Motion to intervene as a defendant under Rule 24.	361. Certificate notifying attorney-general of the United States that the constitutionality of an Act of Congress is drawn in question.
351. Intervener's answer.	362. Notice that constitutionality of act is drawn in question by answer.
352. Motion by subcontractor for leave to intervene in action under the Heard Act.	363. Order that fact that constitutionality of act is drawn in question be certified.
353. Order granting leave to subcontractor to intervene in action under Heard Act.	364. Certificate that constitutionality of amendment to bankruptcy law has been drawn in question.
354. Intervener's complaint for labor under Heard Act.	365. Notice to attorney-general that constitutionality of an Act of Congress is drawn in question.
355. Motion for leave to intervene as of right.	366. Order notifying attorney-general that constitutionality of an Act of Congress has been drawn in question.
356. Motion to intervene by claimant in action to quiet title.	367. Motion of the United States for leave to intervene.
357. Motion by lien holder to intervene in action to foreclose mortgage.	368. Intervening petition of the United States.
358. Motion to intervene by stockholders in representative action.	369. Order granting motion of the United States for leave to intervene and to file petition of intervention.
359. Order granting motion for leave to intervene.	
360. Notice to attorney-general that constitutionality of statute has been drawn in question.	

CHAPTER 14 AMENDED AND SUPPLEMENTAL PLEADINGS

Form	Form
375. Motion for leave to amend pleading.	377. Order granting leave to amend pleading.
376. Notice of motion.	378. Order extending time to amend.

TABLE OF CONTENTS

Form	Form
379. Amended pleading.	385. Order granting leave to serve supplemental pleading.
380. Notice of motion for leave to amend complaint.	386. Supplemental pleading.
381. Order granting leave to amend complaint.	387. Motion for leave to supplement complaint.
382. Order dismissing amended complaint.	388. Notice of motion to supplement complaint.
383. Motion for leave to serve supplemental pleading.	389. Order granting leave to file supplemental complaint.
384. Notice of motion.	

CHAPTER 15

PRETRIAL PROCEDURE

Form	Form
395. Notice of pretrial conference.	397. Pretrial order (Contract action).
396. Pretrial order (Tort action).	398. Order on pretrial conference.

CHAPTER 16

DEPOSITIONS AND DISCOVERY

SECTION 1

DEPOSITIONS

Form	Form
405. Motion for leave to take deposition before issue joined.	419. Notice of application to perpetuate testimony.
406. Order granting leave to take deposition before issue joined.	420. Order directing perpetuation of testimony.
407. Notice of taking depositions of individuals.	421. Order directing perpetuation of testimony of petitioner.
408. Notice of taking deposition of individuals (Alternative form).	422. Motion to perpetuate testimony pending appeal.
409. Notice of taking of depositions.	423. Order to perpetuate testimony pending appeal.
410. Notice of taking deposition of corporation.	424. Motion for commission to take testimony in foreign country.
411. Notice of taking deposition of corporation (Alternative form).	425. Order granting motion for commission.
412. Motion to vacate notice for taking of depositions, for failure to obtain leave of court.	426. Commission to take depositions.
413. Motion to vacate notice for taking of depositions because of fatal defect.	427. Motion for letters rogatory.
414. Motion to vacate notice for taking of depositions, because deposition has already been taken.	428. Order granting motion for letters rogatory.
415. Order granting motion to vacate notice.	429. Letters rogatory.
416. Order denying motion to vacate notice.	430. Stipulation to take depositions.
417. Petition to perpetuate petitioner's testimony under Rule 27 (a).	431. Motion for order that deposition be not taken and to limit examination.
418. Petition to perpetuate testimony of third person under Rule 27 (a).	432. Motion to terminate or limit examination.
	433. Order terminating or limiting examination.
	434. Order fixing place of and limiting examination.
	435. Deposition.

TABLE OF CONTENTS

xiii

Form	Form
436. Certificate of deposition of officer before whom taken.	445. Direct interrogatories to witness.
437. Notice of motion to suppress deposition.	446. Notice of motion for enlargement of time to serve cross-interrogatories.
438. Order suppressing deposition.	447. Order enlarging time to serve interrogatories.
439. Notice of filing of depositions.	448. Notice of cross, redirect, or recross interrogatories to be addressed to a witness.
440. Motion for expenses for failure to attend taking of deposition.	449. Notice of cross, redirect, and recross interrogatories.
441. Order for payment of expenses for failure to attend taking of depositions.	450. Cross, redirect, and recross interrogatories to witness.
442. Motion for expenses for failure to serve subpoena upon witness.	451. Motion for protection of deponents testifying on written interrogatories.
443. Order directing payment of expenses for failure to subpoena witness.	452. Order for protection of deponents testifying on written interrogatories.
444. Notice of taking deposition of witness upon interrogatories.	

SECTION 2

INTERROGATORIES

Form	Form
455. Interrogatories to a party.	460. Objections to interrogatories to a party.
456. —English practice.	461. Order overruling objections to interrogatories.
457. Interrogatories propounded by defendant to plaintiff.	462. Answers to interrogatories served on plaintiff by defendant.
458. Motion to extend time to answer interrogatories.	463. Answers to interrogatories to a party, English practice.
459. Order extending time to answer interrogatories.	

SECTION 3

PRODUCTION OF DOCUMENTS

Form	Form
466. Motion for production of documents under Rule 34.	468. Order permitting entry upon land for inspecting and photographing.
467. Order requiring production of documents.	

SECTION 4

PHYSICAL EXAMINATIONS

Form	Form
471. Motion for physical examination of party.	473. Motion for delivery of report of physical examination.
472. Order for physical examination.	474. Order for delivery of report of physical examination.

TABLE OF CONTENTS

SECTION 5

REQUESTS FOR ADMISSIONS

Form	Form
477. Request for admission under Rule 36.	481. Notice of motion for extension of time within which to respond to request for admission of facts.
478. Request for admission of facts, English practice.	482. Order extending time within which to deny matters contained in request for admission.
479. Request for admission of genuineness of documents.	483. Reply to request for admission of facts.
480. Request for admission of facts, insurance case.	

SECTION 6

ENFORCEMENT OF DISCOVERY

Form	Form
486. Notice of motion to compel answer to questions propounded upon oral examination.	494. Notice of motion to dismiss the action for failure to obey order requiring submission to physical examination.
487. Order compelling answer to questions propounded upon oral examination.	495. Notice of motion for arrest of party for failure to obey order permitting entry upon land.
488. Notice of motion to compel answer to interrogatory.	496. Notice of motion to require payment of expenses of proof for refusal to admit.
489. Order compelling answers to interrogatories.	497. Order for payment of expenses of proof for refusal to admit.
490. Order denying motion to compel answers to interrogatories and requiring examining party to pay expenses to refusing party.	498. Order denying motion for payment of expenses of proof for refusal to admit.
491. Notice of motion to establish facts for failure to comply with order requiring answers to questions.	499. Notice of motion for judgment by default for failure of party to attend taking of his deposition or to serve answers to interrogatories.
492. Order establishing facts for failure to obey order requiring answers to interrogatories.	500. Order directing entry of judgment by default for failure of party to attend taking of his deposition or to serve answers to interrogatories.
493. Notice of motion to prohibit introduction of evidence for failure to obey order requiring production of documents.	

CHAPTER 17

TRIALS

SECTION 1

JURY TRIALS

Form	Form
510. Demand for trial by jury of all issues so triable.	513. Notice of motion to permit service of demand for trial by jury after time expired.
511. Demand for trial by jury of certain specified issues.	514. Order permitting service of demand for trial by jury after expiration of time prescribed therefor.
512. Demand for trial by jury of additional specified issues.	

TABLE OF CONTENTS

xv

<p>Form</p> <p>515. Motion to strike demand for trial by jury.</p> <p>516. Order striking demand for trial by jury.</p> <p>517. Consent to withdrawal of demand for trial by jury.</p> <p>518. Stipulation for trial by court after demand for trial by jury has been made.</p> <p>519. Notice of motion for trial by jury notwithstanding failure of party to serve a demand therefor.</p>	<p>Form</p> <p>520. Order directing trial by jury notwithstanding failure of party to make demand therefor.</p> <p>521. Motion for trial with an advisory jury.</p> <p>522. Order for trial with an advisory jury.</p> <p>523. Order for trial by jury in action not triable of right by jury.</p> <p>524. Stipulation for trial by less than twelve jurors.</p> <p>525. Order designating three-judge statutory court.</p>
---	---

SECTION 2

DISMISSAL OF ACTIONS

<p>Form</p> <p>528. Notice of voluntary dismissal before service of answer.</p> <p>529. Stipulation of dismissal.</p> <p>530. Notice of motion for voluntary dismissal by order of court.</p> <p>531. Notice of proposed dismissal of class action.</p> <p>532. Order directing service of notice of proposed dismissal of a class action.</p> <p>533. Notice of motion for leave to dismiss a class action.</p> <p>534. Order dismissing a class action.</p> <p>535. Order dismissing action after answer served.</p> <p>536. Order denying motion for voluntary dismissal after answer served.</p>	<p>Form</p> <p>537. Notice of motion to dismiss for failure to prosecute.</p> <p>538. Order dismissing action for failure to prosecute.</p> <p>539. Notice of motion for dismissal for failure to prosecute.</p> <p>540. Order of dismissal for failure to prosecute.</p> <p>541. Motion to dismiss.</p> <p>542. Order denying application for preliminary injunction and dismissing action.</p> <p>543. Notice of motion to require payment of costs of prior action voluntarily dismissed.</p> <p>544. Order requiring payment of costs of prior action voluntarily dismissed.</p>
--	--

SECTION 3

CONSOLIDATION OF ACTIONS

<p>Form</p> <p>547. Notice of motion to consolidate actions.</p> <p>548. Order consolidating actions.</p> <p>549. Notice of motion for separate trials.</p>	<p>Form</p> <p>550. Notice of motion for joint trial of issues.</p> <p>551. Order for joint trial of issues.</p>
---	--

SECTION 4

SUBPOENAS

<p>Form</p> <p>554. Subpoena for attendance of witness.</p> <p>555. Subpoena for production of documentary evidence.</p> <p>556. Notice of motion to quash subpoena for production of documents.</p>	<p>Form</p> <p>557. Order quashing subpoena for production of documents.</p> <p>558. Order denying motion to quash subpoena for production of documents.</p>
--	--

TABLE OF CONTENTS

- | | |
|--|---|
| Form | Form |
| 559. Notice of motion for issuance of a subpoena for the production of documentary evidence on taking of a deposition. | 560. Order for issuance of a subpoena for the production of documentary evidence on the taking of a deposition. |

SECTION 5

VERDICTS AND FINDINGS

- | | |
|---|--|
| Form | Form |
| 563. Request for instructions to jury. | 570. Order denying motion to set aside the verdict. |
| 564. Instruction to jury to return special verdict. | 571. Notice of motion for judgment in accordance with motion for directed verdict. |
| 565. Special verdict. | 572. Findings of fact and conclusions of law. |
| 566. Notice of motion to set aside verdict and for judgment or for a new trial. | 573. Notice of motion for amendment of findings by the court. |
| 567. Order directing judgment on motion for directed verdict. | 574. Order amending findings by the court and the judgment accordingly. |
| 568. Order setting aside verdict and granting new trial. | |
| 569. Order setting aside verdict and directing judgment for moving party. | |

CHAPTER 18

MASTERS

- | | |
|---|---|
| Form | Form |
| 580. Notice of motion for general reference to special master. | 591. Notice setting time and place for hearing before master. |
| 581. Order of general reference to special master. | 592. Notice of motion to continue hearing before master. |
| 582. Order of general reference to a master in nonjury action. | 593. Order continuing hearing before master. |
| 583. Order of reference to a master in jury action. | 594. Submission of draft of master's report to counsel. |
| 584. Order referring specific issue of fact to master. | 595. Master's report. |
| 585. Order referring specific issues to a master. | 596. Report of special master on specific issue. |
| 586. Interlocutory judgment referring accounting to master. | 597. Report of special master on accounting. |
| 587. Interlocutory judgment referring patent suit to master on accounting. | 598. Objections to master's report. |
| 588. Stipulation of reference to special master. | 599. Order sustaining objections to master's report. |
| 589. Order of reference to master in a suit in equity before the new rules. | 600. Order overruling objections to master's report. |
| 590. Master's oath. | 601. Notice of motion to adopt master's report. |
| | 602. Order allowing master's compensation. |

CHAPTER 19

JUDGMENTS

Form

- 610. Judgment on motion to dismiss.
- 611. Judgment for plaintiff on verdict.
- 612. Judgment for defendant on verdict.
- 613. Judgment for plaintiff on directed verdict.
- 614. Judgment for defendant on directed verdict.
- 615. Judgment on special verdict.
- 616. Judgment after jury trial involving several defendants.
- 617. Judgments after trial by court.
- 618. Negative covenant in contract for services.
- 619. Negative covenant running with the land.
- 620. To abate a nuisance.
- 621. To enjoin prosecution of suit.
- 622. Enjoining ultra vires transaction.
- 623. In patent case ordering an accounting.
- 624. In action for specific performance.
- 625. In action to remove cloud on title.
- 626. In action to impress a trust.
- 627. In action for declaratory judgment.
- 628. Declaratory judgment in patent suit.
- 629. Action for dissolution of partnership and accounting.
- 630. In action for interpleader.
- 631. Plaintiff awarded costs and execution therefor.
- 632. Judgment for defendant (Alternative form).
- 633. Judgment for recovery of money (District of Columbia form).
- 634. Partial judgment.
- 635. Judgment canceling certificate of citizenship.
- 636. Judgment by statutory three-judge court.
- 637. Notice of taxation of costs.
- 638. Motion to review taxation of costs.

Form

- 639. Order reviewing taxation of costs.
- 640. Affidavit for entry of default by clerk.
- 641. Order of default for failure to plead.
- 642. Affidavit for judgment by default by clerk.
- 643. Judgment by default by clerk.
- 644. Notice of application for judgment by default by court.
- 645. Judgment by default by court.
- 646. Notice of motion to set aside a default judgment.
- 647. Order setting aside default and default judgment.
- 648. Notice of motion for summary judgment.
- 649. Order for summary judgment.
- 650. Summary judgment.
- 651. Notice of motion by plaintiff for judgment on the pleadings.
- 652. Notice of motion by defendant for judgment on the pleadings.
- 653. Order denying motion for judgment on the pleadings.
- 654. Order granting motion for judgment on the pleadings.
- 655. Judgment on order granting motion for judgment on pleadings.
- 656. Judgment on the pleadings (Alternative form).
- 657. Motion for new trial—Various grounds alleged.
- 658. Motion for new trial—Newly-discovered evidence.
- 659. Order granting new trial.
- 660. Order overruling motion for new trial.
- 661. Motion to correct judgment.
- 662. Order correcting clerical mistake in judgment.

CHAPTER 20

CONTEMPT PROCEEDINGS

Form

- 670. Notice of motion to punish for civil contempt.
- 671. Order adjudging a party to an action guilty of civil contempt and imposing sentence.
- 672. Order directing a party to show cause in civil contempt proceeding.

Form

- 673. Order directing witness to show cause in civil contempt proceeding.
- 674. Order denying motion to punish for contempt.
- 675. Order for issuance of a writ of attachment.
- 676. Writ of attachment.

- | | |
|--|---|
| Form | Form |
| 677. Order adjudging witness guilty of civil contempt and imposing sentence. | 679. Petition to punish for criminal contempt. |
| 678. Information charging criminal contempt. | 680. Order adjudging defendant guilty of criminal contempt. |

CHAPTER 21

APPEAL

SECTION 1

APPEAL FROM A DISTRICT COURT TO THE SUPREME COURT

- | | |
|---|---|
| Form | Form |
| 690. Petition for direct appeal from a District Court to the Supreme Court. | 695. Citation in direct appeal from a District Court to Supreme Court. |
| 691. Petition for direct appeal to Supreme Court of United States. | 696. Stipulation for transcript of record. |
| 692. Assignment of errors. | 697. Appellant's statement of points and designation of portions of record on appeal. |
| 693. Order allowing direct appeal from a District Court to Supreme Court. | 698. Statement as to jurisdiction. |
| 694. Order allowing direct appeal to Supreme Court of the United States. | 699. Bond for costs on direct appeal from a District Court to the Supreme Court. |
| | 700. Supersedeas bond on direct appeal from a District Court to Supreme Court. |

SECTION 2

APPEAL TO A CIRCUIT COURT OF APPEALS

- | | |
|--|--|
| Form | Form |
| 703. Notice of appeal to Circuit Court of Appeals under Rule 73 (b). | 710. Designation by appellee of additional matters to be included in record on appeal. |
| 704. Notice of appeal to Circuit Court of Appeals from a part of the judgment. | 711. Statement of points. |
| 705. Bond for costs on appeal. | 712. Stipulation as to record on appeal. |
| 706. Supersedeas bond. | 713. Motion to dismiss appeal. |
| 707. Motion to extend time to file transcript of record. | 714. Order staying mandate of Circuit Court of Appeals. |
| 708. Designation of portions of record to be contained in record on appeal. | 715. Order remanding cause from Circuit to District Court. |
| 709. Designation of record on appeal, appellee making no additional designation. | 716. Order setting aside an order dismissing complaint and granting leave to file further pleadings. |

Part Two

CRIMINAL ACTIONS

CHAPTER 22

CRIMINAL PROCEDURE

- | | |
|-------------------------|---|
| Form | Form |
| 725. Complaint. | 728. Information accompanied by plea of guilty. |
| 726. Warrant of arrest. | 729. Indictment in one count. |
| 727. Information. | |

Form

- 730. Indictment containing more than one count—Using the mails to defraud.
- 731. Indictment under Internal Revenue Laws—Failure to pay special tax.
- 732. Indictment under Internal Revenue Laws relative to intoxicating liquors.
- 733. Indictment for illegally procuring certificate of naturalization.
- 734. Indictment for perjury.
- 735. Indictment for selling liquor without payment of tax.
- 736. Indictment for counterfeiting coin.
- 737. Indictment for smuggling.
- 738. Indictment for smuggling opium.
- 739. Indictment for selling liquor to Indians.
- 740. Indictment for conspiracy.
- 741. Application for warrant of removal.
- 742. Warrant of removal.
- 743. Bench warrant.
- 744. Capias.
- 745. Recognizance.
- 746. Bail piece.
- 747. Search warrant.
- 748. Motion to quash search warrant.
- 749. Motion to suppress evidence.
- 750. Order suppressing evidence.
- 751. Plea in abatement.
- 752. Motion to quash indictment charging conspiracy.

Form

- 753. Motion to quash indictment on various grounds.
- 754. Motion to quash indictment charging perjury.
- 755. Order quashing indictment.
- 756. Demurrer.
- 757. Demurrer to indictment charging perjury.
- 758. Demurrer to indictment charging conspiracy.
- 759. Order sustaining demurrer to indictment.
- 760. Plea of guilty.
- 761. Plea in bar (Former conviction or acquittal).
- 762. Plea of former jeopardy.
- 763. Plea in bar (Pardon).
- 764. Plea in bar (Statute of limitations).
- 765. Subpoena.
- 766. Motion for new trial.
- 767. Motion for new trial for newly-discovered evidence.
- 768. Order granting motion for new trial.
- 769. Judgment and commitment.
- 770. Motion in arrest of judgment.
- 771. Order granting motion in arrest of judgment.
- 772. Notice of appeal in criminal case.
- 773. Notice of appeal in criminal case.
- 774. Supersedeas bond.
- 775. Order extending time to settle and file bill of exceptions.
- 776. Bill of exceptions.
- 777. Precipe in criminal action.

Part Three

SPECIAL REMEDIES AND PROCEEDINGS

CHAPTER 23

HABEAS CORPUS

Form

- 785. Petition for writ of habeas corpus by prisoner in federal institution.
- 786. Order granting writ.
- 787. Writ of habeas corpus.
- 788. Answer.
- 789. Petition for writ of habeas corpus in deportation proceeding.
- 790. Order dismissing writ of habeas corpus in deportation proceeding.
- 791. Petition for writ of habeas corpus ad prosequendum.
- 792. Order directing issuance of writ of habeas corpus ad prosequendum.

Form

- 793. Writ of habeas corpus ad prosequendum.
- 794. Writ of habeas corpus ad prosequendum.
- 795. Petition for a writ of habeas corpus ad testificandum.
- 796. Writ of habeas corpus ad testificandum.
- 797. Petition for writ of habeas corpus in removal proceedings.
- 798. Order issuing writ of habeas corpus.

CHAPTER 24

BANKRUPTCY

Form	Form
805. Debtor's petition.	843. Order to third person to turn over property.
806. Statement of affairs for bankrupt or debtor not engaged in business.	844. Order that no trustee be appointed.
807. Statement of affairs or debtor engaged in business.	845. Order for examination of bankrupt.
808. Partnership petition.	846. Subpoena to witness.
809. Creditors' petition.	847. Proof of claim by individual.
810. Subpoena to alleged bankrupt.	848. Proof of claim by corporation.
811. Answer of alleged bankrupt.	849. Proof of claim by partnership.
812. Petition for appointment of receiver.	850. Proof of claim by agent or attorney.
813. Bond of applicant for a receiver or marshal.	851. Affidavit of loss of negotiable instrument.
814. Order appointing receiver.	852. Order expunging or reducing claim.
815. Petition for appointment of ancillary receiver.	853. Order for payment of dividends.
816. Order appointing ancillary receiver.	854. Petition for sale of real estate.
817. Petition by receiver for leave to appoint attorney.	855. Order for sale of real estate.
818. Order authorizing receiver to retain counsel.	856. Petition for redemption of property.
819. Petition for allowance by attorney for receiver.	857. Order for redemption of property.
820. Counterbond to receiver or marshal.	858. Trustee's report of exempt property.
821. Petition in reclamation proceedings.	859. Report of trustee in no asset case.
822. Order granting reclamation.	860. Petition for discharge.
823. Report of receiver.	861. Order fixing time for filing objections to discharge.
824. Adjudication that debtor is not a bankrupt.	862. Notice of order fixing time for filing objections to discharge.
825. Adjudication of bankruptcy.	863. Specification of objections to discharge.
826. Appointment and oath of appraiser.	864. Discharge of bankrupt.
827. Order of general reference.	865. Referee's cash book.
828. Order of reference in judge's absence.	866. Referee's financial statement.
829. Referee's oath of office.	867. Original petition in proceedings under chapter XI.
830. Bond of referee.	868. Notice of meeting of creditors in proceedings under chapter XI.
831. Notice of first meeting of creditors.	869. Application for confirmation of an arrangement under chapter XI.
832. Power of attorney.	870. Order confirming an arrangement under Chapter XI. (Where all affected creditors have accepted.)
833. Special power of attorney.	871. Order confirming an arrangement under chapter XI. (Where less than all affected creditors have accepted.)
834. Order approving appointment of trustee.	872. Original petition in proceedings under chapter XII.
835. Appointment of trustee by referee.	873. Notice of meeting of creditors in proceedings under chapter XII.
836. Notice to trustee of his appointment.	874. Application for confirmation of an arrangement under chapter XII.
837. Bond of receiver or trustee.	875. Order confirming an arrangement under chapter XII. (Where all affected creditors have accepted.)
838. Order approving trustee's bond.	
839. Motion for order to turn over property.	
840. Turn over order.	
841. Petition for turn over order.	
842. Order to show cause on petition for turn over order.	

TABLE OF CONTENTS

xxi

Form	Form
876. Order confirming an arrangement under chapter XII. (Where less than all affected creditors have accepted.)	886. Notice of first meeting of creditors in proceedings under section 75.
877. Original petition in proceedings under chapter XIII.	837. Application for confirmation of a composition or extension proposal under section 75.
878. Notice of meeting of creditors in proceedings under chapter XIII.	888. Order confirming a composition or extension proposal under section 75.
879. Application for confirmation of an arrangement under chapter XIII.	889. Petition for corporate reorganization (Under former section 77B).
880. Order confirming a plan under chapter XIII. (Where all affected creditors have accepted.)	890. Answer and contravention by a secured creditor (Under former section 77B).
881. Order confirming a plan under chapter XIII. (Where less than all affected creditors have accepted.)	891. Order confirming plan of reorganization (Under former section 77B).
882. Debtor's petition in proceedings under section 75 of the Bankruptcy Act.	892. Voluntary petition for corporate reorganization under chapter X.
883. Order approving debtor's petition in proceedings under section 75.	893. Order approving filing of voluntary petition under chapter X.
884. Order of reference in proceedings under section 75.	894. Involuntary petition for corporate reorganization under chapter X.
885. Bond of conciliation commissioner.	895. Answer to involuntary petition for corporate reorganization under chapter X.

CHAPTER 25

COURT OF CLAIMS OF THE UNITED STATES

Form	Form
900. Petition in contract case.	906. Traverse by government.
901. Petition in tax case.	907. Judgment.
902. Petition in patent case.	908. Petition to the Supreme Court for a writ of certiorari to the Court of Claims.
903. Demurrer.	
904. Plea to the jurisdiction.	
905. Motion for call.	

Part Four

ADMINISTRATIVE AGENCIES

CHAPTER 26

UNITED STATES BOARD OF TAX APPEALS

Form	Form
915. Petition for redetermination of tax deficiency.	920. Petition for review and assignments of error.
916. Answer by Commissioner of Internal Revenue.	921. Notice of filing petition for review.
917. Judgment of Board of Tax Appeals.	922. Petition by taxpayer for review of decision of Board of Tax Appeals.
918. Motion to reconsider board's decision.	923. Precipe.
919. Order denying motion for reconsideration.	924. Judgment.
	925. Order allowing certiorari.

TABLE OF CONTENTS

CHAPTER 27

INTERSTATE COMMERCE COMMISSION

- | | |
|--|---|
| Form | Form |
| 935. Order of Interstate Commerce Commission denying application of motor carrier. | 939. Answer to complaint to enjoin violations of Motor Carrier Act. |
| 936. Complaint to set aside order of Interstate Commerce Commission. | 940. Complaint to set aside an order of Interstate Commerce Commission. |
| 937. Answer to complaint to set aside order of Interstate Commerce Commission. | 941. Answer of United States of America. |
| 938. Complaint to enjoin violations of Motor Carrier Act. | |

CHAPTER 28

FEDERAL TRADE COMMISSION

- | | |
|---|--|
| Form | Form |
| 950. Complaint. | 956. Application for enforcement of order of Federal Trade Commission. |
| 951. Answer. | |
| 952. Order appointing examiner. | 957. Answer to application for enforcement of order of commission. |
| 953. Motion for issuance of supplemental complaint. | 958. Petition for review of order of Federal Trade Commission. |
| 954. Order for issuance of supplemental complaint. | 959. Order allowing filing of petition for review. |
| 955. Order to cease and desist. | |

CHAPTER 29

FEDERAL COMMUNICATIONS COMMISSION

- | | |
|------------------------------|--|
| Form | Form |
| 965. Petition for rehearing. | 968. Reasons for appeal. |
| 966. Affidavit of service. | 969. Notice of intention to intervene. |
| 967. Notice of appeal. | |

CHAPTER 30

SECURITIES AND EXCHANGE COMMISSION

- | | |
|---|---|
| Form | Form |
| 975. Petition for review of stop order of Securities and Exchange Commission. | 980. Complaint in action by the Securities and Exchange Commission to enjoin sale of unregistered securities. |
| 976. Order granting petition for review. | |
| 977. Petition for review of determination by commission denying application for confidential treatment. | 981. Answer to complaint in action by Securities and Exchange Commission to enjoin sale of unregistered securities. |
| 978. Notice of petition for review. | |
| 979. Order granting leave to file petition for review in Circuit Court of Appeals. | |

CHAPTER 31

NATIONAL LABOR RELATIONS BOARD

Form

- 990. Charge.
- 991. Complaint.
- 992. Extension of time for answer.
- 993. Answer of respondent.
- 994. Order designating trial examiner.
- 995. Notice of hearing.
- 996. Notice of postponement of hearing.
- 997. Intermediate report of trial examiner.

Form

- 998. Exceptions to intermediate report of the trial examiner.
- 999. Decision and order.
- 1000. Petition for review.
- 1001. Petition for enforcement of an order of National Labor Relations Board.
- 1002. Petition for leave to intervene.
- 1003. Decree granting leave to intervene.
- 1004. Petition for rehearing.
- 1005. Decree of Circuit Court of Appeals.

CHAPTER 32

SECRETARY OF AGRICULTURE

Form

- 1015. Complaint to enjoin violation of order of Secretary of Agriculture.
- 1016. Complaint to enjoin enforcement of orders of Secretary of Agriculture (Cotton quota).

Form

- 1017. Answer in action to enjoin order of Secretary of Agriculture.
- 1018. Motion by United States for leave to intervene.
- 1019. Order granting leave to intervene.
- 1020. Answer of United States as intervening defendant.

FEDERAL PROCEDURAL FORMS

PART ONE CIVIL ACTIONS

CHAPTER 1 CAPTIONS

Form

1. Individuals.
2. Partners.
3. Unincorporated associations.
4. Corporations.
5. Executors and administrators.

Form

6. For the use of another.
7. Under a statute of the United States
for the use of another.
8. Next friend.
9. Guardians.

INTRODUCTION.—All pleadings, motions, orders, and other papers provided for by the Federal Rules of Civil Procedure must contain a caption. The names of all parties must be listed in the caption of the complaint, while in subsequent papers, it is sufficient to give the name of the first party on each side with an appropriate indication of other parties.

1. Individuals.

District Court of the United States
_____ District of _____
_____ Division

John Doe,

v.

Richard Roe,

Plaintiff,

Defendant.

Civil No. _____
Complaint

Cross-Reference.

Advisory notes to Rule 7 (b), see Form 205; Rules 10 (a), 17 (a), see Form 56; Rule 17 (b), see Forms 2, 3.

Statutory Reference.

Defects in form immaterial, 8 F. C. A., Title 28, § 777; U. S. C. A., Title 28, § 777; id. U. S. C.

Federal Rules of Civil Procedure.

"The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules." Rule 7 (b) (2).

"Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." Rule 10 (a).

"Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; * * *." Rule 17 (a).

"The capacity of an individual, * * * to sue or be sued shall be determined by the law of his domicile. * * *." Rule 17 (b).

2. Partners.

District Court of the United States

_____ District of _____

John Doe and Richard Roe, doing
business under the name of Doe &
Roe,

Plaintiff,

v.

John Smith,

Defendant.

Civil No. _____
Complaint

Cross-Reference.

See notes to Form 1.

Federal Rules of Civil Procedure.

"* * * a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." Rule 17 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 17 (b): "For capacity see generally Clark and Moore, A New Federal Civil Procedure—II. Pleadings and Parties, 44 Yale L. J. 1291, 1312-1317 (1935) and specifically Coppedge v. Clinton, 72 F.

(2d) 531 (C. C. A. 10th, 1934) (natural person); David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489 (1912) (corporation); Puerto Rico v. Russell & Co., 288 U. S. 476 (1933) (unincorporated ass'n.); United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare Moffat Tunnel League v. United States, 289 U. S. 113 (1933). See note to Rule 23, clause (1)."

NOTES TO DECISIONS**Capacity to Sue or Be Sued [Rule 17 (b)].**

A statutory receiver of a Michigan bank appointed by the commissioner of the state banking department of that state may sue in the federal courts in New York, since the laws of the latter

state permit suits therein by foreign receivers. Bicknell v. Lloyd-Smith (C. C. A. 2), 109 Fed. (2d) 527, revg. 29 Fed. Supp. 929.

An unincorporated labor organization is subject to suit in its common name. National Assn. of Industrial Ins. Agents

v. Committee for Industrial Organization (D. C.-D. C.), 25 Fed. Supp. 540.

A state rule that a suit by a copartnership must be brought in the names of the individual partners is superseded in patent suits by the provision of this rule that a partnership may sue in its common name for the purpose of enforcing a substantive right existing under the Constitution or laws of the United States. Gregory v. Royal Typewriter Co. (D. C.-N. Y.), 27 Fed. Supp. 160, 41 U. S. P. Q. 85.

In an action for infringement of a patent brought in the southern district of New York, plaintiff, a copartnership maintaining its place of business in said district, although composed of partners residing in New Jersey, was not required to post bond for costs as a nonresident.

Gregory v. Royal Typewriter Co. (D. C.-N. Y.), 27 Fed. Supp. 160, 41 U. S. P. Q. 85.

A guardian or administrator appointed in one state may not bring suit in a federal court in another state, if by the laws of the latter state such guardian does not have capacity to sue. Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co. (D. C.-N. Y.), 27 Fed. Supp. 485; Ballard v. United Distillers Co. (D. C.-Ky.), 28 Fed. Supp. 633.

The capacity of a foreign executor to sue or be sued in his representative capacity is determined by the law of the state in which the federal court is held. Pirnie v. Andrews (D. C.-N. Y.), 30 Fed. Supp. 157; Bicknell v. Lloyd-Smith (C. C. A. 2), 109 Fed. (2d) 527, revg. 29 Fed. Supp. 929.

3. Unincorporated Associations.

District Court of the United States

_____ District of _____

United Mine Workers of America,
Plaintiff,
v.
Coronado Coal Company,
Defendant.

Civil No. _____
Reply

Cross-Reference.

See notes to Forms 1, 2.

NOTES TO DECISIONS

Labor Organizations.

An unincorporated labor organization is subject to suit in its common name for the purpose of enforcing certain rights against it. National Assn. of Industrial

Ins. Agents v. Committee for Industrial Organization (D. C.-D. C.), 25 Fed. Supp. 540. See also United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 66 L. ed. 975, 42 Sup. Ct. 570.

4. Corporations.

District Court of the United States

_____ District of _____

The ABC Co., Inc.
Plaintiff,
v.
John Doe,
Defendant.

Civil No. _____
Complaint

Cross-References.

See notes to Form 1.

For notes to Rule 17 (b), see Form 2.

Federal Rules of Civil Procedure.

"* * * The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized * * *." Rule 17 (b).

5. Exccutors and Administrators.

District Court of the United States

_____ District of _____

_____ Division

John Doe as Administrator of the
Estate of Jane Doe,

Plaintiff,

v.

Mary Roe as Executrix of the Estate
of Richard Roe,

Defendant.

Civil No. _____

Answer

Cross-References.

See notes to Form 1.

For notes to Rule 17 (b), see Form 2.

Federal Rules of Civil Procedure.

"The capacity of an individual, other than one acting in a representative ca-

capacity, to sue or be sued shall be determined by the law of his domicile. * * * In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; * * *." Rule 17 (b).

6. For the Use of Another.

District Court of the United States

_____ District of _____

John Doe for the use of Richard Roe,

Plaintiff,

v.

The AB Company,

Defendant.

Civil No. _____

Motion for Bill of Particulars

Cross-Reference.

See notes to Form 1.

NOTES TO DECISIONS**Action to Use of Another Sustained.**

The requirement of Rule 17 (a) that every action be prosecuted in the name of the real party in interest does not necessarily preclude the bringing of an action by one party "to the use" of another, in cases in which actions were brought in that manner before the effective date of the Federal Rules of Civil Procedure. Lloyd Moore, Inc. v. Schwartz (D.C.-Pa.), 26 Fed. Supp. 188.

Diversity of Citizenship.

In an action in which there is a "nominal" plaintiff and a "use" plaintiff, the residence of the former is determinative of the question whether the requisite diversity of citizenship exists for jurisdictional purposes. Lloyd Moore, Inc. v. Schwartz (D.C.-Pa.), 26 Fed. Supp. 188.

7. Under a Statute of the United States for the Use of Another.

District Court of the United States
 _____ District of _____

United States of America, for the
 use of the AB Sand Company,
 Plaintiff,
 v.
 The CD Surety Company,
 Defendant.

Civil No. _____
 Answer

Cross-References.

See notes to Form 1.

For notes to Rule 17 (a), see Form 56.

Statutory Reference.

Persons furnishing labor or material for work on a public building contract may sue on a payment bond in the name of the United States for the use of the person suing, 9 A, F. C. A., Title 40, § 270b; U. S. C. A., Title 40, § 270b; id. U. S. C.

Federal Rules of Civil Procedure.

"* * * when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." Rule 17 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 17 (a): "The real party in interest provision, except for the last clause which is new, is taken verbatim from Equity Rule 37 (Parties Generally—Interven-

tion), except that the word 'expressly' has been omitted. For similar provisions see N. Y. C. P. A. (1937) § 210; Wyo. Rev. Stat. Ann. (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U. S. C., Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, 'in the name of the United States for the use of the person suing'); and U. S. C., Title 25, § 201 (Penalties under laws relating to Indians—how recovered). Compare U. S. C., Title 26, § 1645 (c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States)."

8. Next Friend.

District Court of the United States
 _____ District of _____

Mary Doe, by Richard Roe, her next
 friend,

Plaintiff,

v.

AB and CD,

Defendants.

Civil No. _____
 Complaint

Cross-References.

See notes to Form 1.

For notes to Rule 17 (c), see Form 56.

Federal Rules of Civil Procedure.

"Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator,

or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. * * *." Rule 17 (c).

9. Guardians.

District Court of the United States

_____ District of _____

John Doe as Guardian of Mary Roe, }
Plaintiff, }
v. }
The AB Traction Company, et al., }
Defendants. }

Civil No. _____

Answer

Cross-Reference.

See notes to Forms 1, 8.

CHAPTER 2

SUMMONS

Form

15. Summons.
16. Motion for special appointment of person to serve summons.
17. Order of special appointment.
18. Marshal's return of service upon an individual.
19. Affidavit of service upon an individual by a person specially appointed.
20. Affidavit of service upon a corporation, partnership, or unincorporated association.
21. Affidavit of service upon the United States.
22. Affidavit of service upon an officer or agency of the United States.
23. Affidavit of service upon a corporation which is an agency of the United States.
24. Affidavit of service upon a state or municipal corporation.
25. Motion for order for service upon absent defendant in action involving title to property.

Form

26. Affidavit for order for service upon absent defendant in action involving title to property.
27. Order for service upon absent defendant in action involving title to property.
28. Affidavit of personal service of order on absent defendant in action involving title to property.
29. Affidavit of personal service of order on person in possession in action involving title to property.
30. Motion for service by publication.
31. Affidavit for order for service by publication on absent defendants.
32. Order for service by publication on absent defendants in action involving title to property.
33. Proof of publication of order in lieu of summons in action involving title to property.

INTRODUCTION.—A civil action is commenced by the filing of a complaint. The summons is issued by the clerk of the court upon the filing of a complaint [Rule 4 (a)]. It may be served either by a United States marshal or by some person specially appointed by the court for that purpose [Rule 4 (a)]. Such an appointment is made by order of the court in the action. The appropriate method of securing such an order is by motion.

15. Summons.

(Caption.)

To the above-named defendant:

You are hereby summoned and required to serve upon —, plaintiff's attorney, whose address is —, an answer to the complaint which is herewith served upon you, within — *days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by

default will be taken against you for the relief demanded in the complaint.

Date _____.

[SEAL]

Clerk of the court.

Deputy clerk.

* The clerk inserts "20" unless the defendant is the United States or a federal agency or a federal officer sued in his official capacity, in which event "60" is inserted. Rule 12(a).

Statutory References.

Amendment of summons, 8 F. C. A., Title 28, §§ 767, 777; U. S. C. A., Title 28, §§ 767, 777; id. U. S. C.

Defects in form immaterial, 8 F. C. A., Title 28, § 777; U. S. C. A., Title 28, § 777; id. U. S. C.

Process after removal of suits to federal courts, 7 F. C. A., Title 28, § 83; U. S. C. A., Title 28, § 83; id. U. S. C.

Sealing, testing, and time of writs, 8 F. C. A., Title 28, §§ 721-723; U. S. C. A., Title 28, §§ 721-723; id. U. S. C.

Federal Rules of Civil Procedure.

"Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants." Rule 4 (a).

"The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint." Rule 4 (b).

"At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued." Rule 4 (h).

"A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service

of process is made pursuant to Rule 4 (e). * * * The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. * * *

Rule 12 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 4 (a): "With the provision permitting additional summons upon request of the plaintiff, compare Equity Rule 14 (Alias Subpoena) and the last sentence of Equity Rule 12 (Issue of Subpoena—Time for Answer)."

NOTE OF ADVISORY COMMITTEE TO RULE 4 (b): "This rule prescribes a form of summons which follows substantially the requirements stated in Equity Rules 12 (Issue of Subpoena—Time for Answer) and 7 (Process, Mesne and Final).

"U. S. C., Title 28, § 721 (Sealing and testing of writs) is substantially continued in so far as it applies to a summons, but its requirements as to teste of process are superseded. U. S. C., Title 28, § 722 (Teste of process, day of) is superseded.

"See Rule 12 (a) for a statement of the time within which the defendant is required to appear and defend."

NOTE OF ADVISORY COMMITTEE TO RULE 4 (h): "This rule substantially continues U. S. C., Title 28, § 767 (Amendment of process)."

NOTE OF ADVISORY COMMITTEE TO RULE 12 (a): "1. Compare Equity Rules 12 (Issue of Subpoena—Time for Answer) and 31 (Reply—When Required—When Cause at Issue); 4 Mont. Rev. Codes Ann. (1935) §§ 9107, 9158; N. Y. C. P. A. (1937) § 263; N. Y. R. C. P. (1937) Rules 109-111.

"2. U. S. C., Title 28, § 763 (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant

shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. In so far as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See

U. S. C., Title 28, § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

"3. Compare the last sentence of Equity Rule 29 (Defenses—How Presented) and N. Y. C. P. A. (1937) § 283. See Rule 15 (a) for time within which to plead to an amended pleading."

NOTES TO DECISIONS

Amendment of Summons.

A paper not under the seal of the court, nor signed by the clerk of the court, is no process and is not amendable under 8 F. C. A., Title 28, § 767; U. S. C. A., Title 28, § 767; *id.* U. S. C. Dwight v. Merritt (C. C.-N. Y.), 4 Fed. 614.

Writs made returnable on Sunday may be amended. *Duy v. Knowlton* (C. C.-Ind.), 14 Fed. 107.

If there be no summons, or if the summons misleads, or tends to mislead, the defendant, or to put him off his guard, or if the amendment works a surprise on him, or if there be nothing in the record to amend by, the amendment should not be allowed. *Chamberlain v. Bittersohn* (C. C.-S. Car.), 48 Fed. 42.

A change in the name in a summons is within the discretion of the court. *Gulf C. & S. F. R. Co. v. James* (C. C. A. 8), 48 Fed. 148.

Where the declaration and summons first served contained a mistake in the place to which the writ was returnable, it was a proper case in which to exercise the discretion of the court to amend. *Caraway v. Kentucky Ref. Co.* (C. C. A. 6), 163 Fed. 189.

A summons may be amended by inserting the date of actual service. *Speare v. Stone* (C. C. A. 1), 193 Fed. 375.

Summons in proper form, but directed to marshal of wrong district, was amendable. *Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co.* (C. C. A. 4), 37 Fed. (2d) 695.

Where defects were substantive, summons was properly quashed. *United States v. Van Dusen* (C. C. A. 8), 78 Fed. (2d) 121.

Condemnation Proceedings.

The service of summons in condemnation proceedings need not be accompanied by the delivery of a copy of the complaint, as the rules do not govern them except in respect of appeals. *Order of Judge Trimble* (D. C.-Ark.), 16 Bull. 23, 1 Fed. R. Dec. 198.

When Defenses Presented.

The court has no power to shorten the time for answer prescribed herein. *Food Mach. Corp. v. Guignard* (D. C.-Ore.), 26 Fed. Supp. 1002.

Plaintiff should be required to accept defendant's answer on the merits after the district court's decision, dismissing the complaint for failure to state a cause of action, has been reversed by the Circuit Court of Appeals. *United States v. Revere Copper & Brass Co.* (D. C.-N. Y.), 28 Fed. Supp. 277.

16. Motion for Special Appointment of Person to Serve Summons.

(Caption.)

The plaintiff moves the court to appoint John Doe, residing at —, a qualified person over — years of age, to serve the summons and complaint herein on —, the above-named defendant(s). The travel necessary to effect such service will probably approximate — miles, and a saving of approximately — dollars (\$—) in travel fees will result.

Attorney for plaintiff.

Address.

Cross-Reference.

See notes to Form 15.

Statutory Reference.

Service by a disinterested person where the marshal or his deputy is a party in a cause, 8 F. C. A., Title 28, § 735; U. S. C. A., Title 28, § 735; *id.* U. S. C.

Federal Rules of Civil Procedure.

"Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result." Rule 4 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 4 (c): "This Rule does not affect U. S.

C., Title 28, § 503, as amended June 15, 1935 (Marshals; duties) and such statutes as the following in so far as they provide for service of process by a marshal, but modifies them in so far as they may imply service by a marshal only:

"U. S. C., Title 15:

§ 5 (Bringing in additional parties) (Sherman Act)

§ 10 (Bringing in additional parties)

§ 25 (Restraining violations; procedure)

"U. S. C., Title 28:

§ 45 (Practice and procedure in certain cases under the interstate commerce laws)

"Compare Equity Rule 15 (Process, by Whom Served)."

NOTES TO DECISIONS**By Whom Served [Rule 4 (g)].**

In view of the fact that under this rule the court is permitted to designate only one person by name, an application for permission to a "county sheriff or any of his deputies" to serve the summons must be denied. *Modric v. Oregon & N. W. R. Co.* (D. C.-Ore.), 25 Fed. Supp. 79.

The motion and order should designate by name the person who is to make service. It is not sufficient to designate an officer solely by his title. *Schuldt v. Schumann* (D. C.-Wash.), 5 Bull. 1.

The attorney for one of the parties should not be designated to make service of process in an action. *In re Evanishyn* (D. C.-N. Y.), 30 Bull. 1, 1 Fed. R. Dec. 202.

Service of a petition for involuntary bankruptcy and the subpoena may be made by a person specially appointed by the court for that purpose. *In re Evanishyn* (D. C.-N. Y.), 30 Bull. 1, 1 Fed. R. Dec. 202.

Motion Proper for Special Appointment.

It is proper for the attorney desiring service to be made by a person specially appointed, to move for the designation of a particular individual by name, setting forth his qualifications, including the distance he will have to travel to make the service. *Modric v. Oregon & N. W. R. Co.* (D. C.-Ore.), 25 Fed. Supp. 79.

17. Order of Special Appointment.

(Caption.)

On motion of AB, attorney for the plaintiff, it is

Ordered that John Doe, residing at — is hereby appointed to serve the summons and complaint herein on —, the above-named defendant(s).

District judge.

Date —.

Cross-Reference.

See notes to Forms 15, 16,

18. Marshal's Return of Service upon An Individual.

Received the summons and complaint herein on the — day of —, 19—, and made service thereof on the — day of —, 19—, on John Doe, the defendant (one of the defendants) in this action

1. By delivering a copy of the summons and of the complaint to him personally at —.

2. By leaving a copy of the summons and of the complaint at his dwelling-house or usual place of abode at — with Mary Doe, a person of suitable age and discretion then residing therein.

3. By delivering a copy of the summons and of the complaint at —, to Richard Roe, an agent authorized by appointment (by law) to receive service of process.

Marshal's fees

Travel.....\$——

Service\$——

United States marshal.

By——

Deputy United States marshal.

Note.

Use par. 1, 2, or 3, according to the manner in which service was made.

Cross-Reference.

See notes to Forms 15, 16, and 19.

Statutory References.

An agent of a nonresident defendant in a patent case, conducting the business of the defendant in the district in which the action is brought, is an agent authorized by law to receive service of process, 7 F. C. A., Title 28, § 109; U. S. C. A., Title 28, § 109; id. U. S. C.

Statutes of the United States providing that certain process may be served beyond the territorial limits of the state in which the District Court is held, include:

1. 4 F. C. A., Title 15, §§ 5, 25; U. S. C. A., Title 15, §§ 5, 25; id. U. S. C., process to summon additional parties in actions to restrain violations of antitrust laws.

2. 7 F. C. A., Title 28, § 44; U. S. C. A., Title 28, § 44; id. U. S. C., orders, writs, and processes of District Courts in actions to enforce or enjoin orders of Interstate Commerce Commission.

3. 7 F. C. A., Title 28, § 117; U. S. C. A., Title 28, § 117; id. U. S. C., process in receivership proceedings involving property in different states in same circuit.

4. 8 F. C. A., Title 28, § 839; U. S. C. A., Title 28, § 839; id. U. S. C., writs

of execution upon judgments obtained for the use of the United States.

Federal Rules of Civil Procedure.

"The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

"(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

"(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent

authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

"(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

"(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

"(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

"(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state * * *." Rule 4 (d).

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45." Rule 4 (f).

NOTE OF ADVISORY COMMITTEE TO RULE 4 (d): "Under this rule the complaint must always be served with the summons.

"Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U. S. C., Title 28, § 109 (Patent cases).

"Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian v. International Ass'n of Machinists*, 7 F. (2d) 481 (D. C. Ky., 1925) and *Singleton v. Order of Railway Conductors of America*, 9 F. Supp. 417 (D. C.-Ill., 1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case*, 93 F. (2d) 56 (App. D. C., 1937).

"For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U. S. C., Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

"Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U. S. C., Title 7, §§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c (15) (B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c (15) (B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U. S. C., Title 26, § 1569 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U. S. C., Title 28, §§ 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws), 763 (Petition in suit against the United States; service; appearance by district attorney), 766 (Partition suits where United States is tenant in common or joint tenant), 902 (Foreclosure of mortgages or other liens on property in which the United States has an interest).

These and similar statutes are modified in so far as they prescribe a different method of service or dispense with the service of a summons.

"For the Equity Rule on service, see Equity Rule 13 (Manner of Serving Subpoena)."

NOTE OF ADVISORY COMMITTEE TO RULE 4 (f): "This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

"U. S. C., Title 28, §§ 113 (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), 115 (Suits of a local nature), 116 (Property in different districts in same state), 838 (Executions run in all districts of state); U. S. C., Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line

refuses or fails to operate such line in a certain manner—'upon any agent of the company found in such state'); U. S. C., Title 49, § 321 (c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the state) and similar statutes, allowing the running of process throughout a state, are substantially continued.

"U. S. C., Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U. S. C., Title 28, §§ 44 (Procedure in certain cases under interstate commerce laws; service of processes of court), 117 (Property in different states in same circuit; jurisdiction of receiver), 839 (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a state, are expressly continued."

NOTES TO DECISIONS

Summons; Personal Service [Rule 4 (d)].

Service of summons and complaint upon a foreign corporation by delivering a copy thereof to an officer of the corporation is not effective unless the corporation is doing business within the state. *Pioneer Utilities Corp. v. Scott-Newcomb* (D. C.-N. Y.), 26 Fed. Supp. 616; *Hedrick v. Canadian Pac. R. Co.* (D. C.-Ohio), 28 Fed. Supp. 257; *Leading Perfumers & Chemists, Inc. v. Nussbaum Novelty Co.* (D. C.-N. Y.), 31 Fed. Supp. 847.

A motion to dismiss should be granted if a necessary party defendant has not been served with process. *Massachusetts Farmers Defense Committee v. United States* (D. C.-Mass.), 26 Fed. Supp. 941.

Where the unconstitutionality of the Marketing Agreement Act (2 F. C. A., Title 7, §§ 852 to 854; U. S. C. A., Title 7, §§ 852 to 854; *id.* U. S. C.) is charged, there must be personal service upon the secretary of agriculture since he is the only one who has power to enforce the act. Without this, jurisdiction is not acquired and a motion to dismiss should be granted. *Massachusetts Farmers Defense Committee v. United States* (D. C.-Mass.), 26 Fed. Supp. 941.

In an action to recover damages for personal injuries sustained on a public highway in New York City in which

defendants were citizens and residents of West Virginia, service of process was properly made by serving copies on the secretary of state of New York and by mailing copies by registered mail to defendants, and, on defendants' refusal to accept the registered mail, by personal service by a deputy United States marshal in West Virginia. *Clancy v. Balcier* (D. C.-N. Y.), 27 Fed. Supp. 867.

Service of process on an agent of a foreign corporation who is denominated "general manager" for purposes of business negotiations is valid service on the corporation, even though the latter claims that the person served was in fact only "a sales representative." *Cohen v. Physical Culture Shoe Co.* (D. C.-N. Y.), 28 Fed. Supp. 679.

A motion to substitute the United States as a party defendant is an attempt to commence a new action and consequently process must be served as provided by the rules. *Phoenix State Bank & Trust Co. v. Bitgood* (D. C.-Conn.), 28 Fed. Supp. 899.

A copy of the complaint was served with the summons. Thereafter the summons and service were quashed, and subsequently an alias summons was served without a copy of the complaint. The second service was valid, since the

defendant had previously received a copy of the complaint. *Moore v. Lehigh* (D. C.-Okla.), 29 Fed. Supp. 39.

Motion to quash service of process on the ground that defendant corporation was not doing business within the state and that summons was not served on a proper representative of the defendant, raising complicated issues of fact, may be referred to a special master. *Schlesinger v. Ingber* (D. C.-N. Y.), 29 Fed. Supp. 581; *Lazar v. Cecelia Co.* (D. C.-N. Y.), 37 Bull. 1, 1 Fed. R. Dec. 66.

If, after removal from a state to a federal court, the state court process served upon defendant proves to be defective, new process may be issued out of the federal court and delivered to the marshal for service in the same manner as in actions originally commenced in the federal court. *Gresham v. Swift & Co.* (D. C.-La.), 29 Fed. Supp. 824.

In an action against a foreign corporation, plaintiff may require defendant to supply information as to whereabouts of an agent upon whom service of process may be made. *Gresham v. Swift & Co.* (D. C.-La.), 29 Fed. Supp. 824.

A corporation's agent for the service of process on it is not also such agent for another merely because the latter wholly owns and controls the former corporation. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* (D. C.-Pa.), 31 Fed. Supp. 403.

Valid service on a foreign corporation doing business within the state may be made by service on a managing agent of the corporation. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* (D. C.-Pa.), 31 Fed. Supp. 403.

A motion to set aside service of summons and complaint should not be entertained unless made within the 20-day period for filing answer. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* (D. C.-Pa.), 31 Fed. Supp. 403.

A party may not move to dismiss for lack of venue after denial of a motion made by him to set aside service of process. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* (D. C.-Pa.), 31 Fed. Supp. 403.

Defendant's motion to set aside service of the summons should be granted if it

appears that since service of the process the complaint has been amended by asserting a new claim for relief and service of such amended complaint has not been made on defendant. *Utility Mfg. Co. v. Elgin Laboratories* (D. C.-N. Y.), 22 Bull. 1, 1 Fed. R. Dec. 165.

Territorial Limits of Effective Service [Rule 4 (f)].

Third-party process may not be served outside of the state in which the action is pending. *F. & M. Skirt Co., Inc. v. Wimpfheimer* (D. C.-Mass.), 27 Fed. Supp. 239.

In an action for personal injuries resulting from an automobile accident, service of process on a nonresident defendant by serving the state commissioner of motor vehicles under a state statute is valid even though the latter resided in another judicial district of the state. *Devier v. George Cole Motor Co.* (D. C.-W. Va.), 27 Fed. Supp. 978.

The rule that process may run anywhere within the territorial limits of the state in which the District Court is held does not change the venue requirements. *Gibbs v. Emerson Elec. Mfg. Co.* (D. C.-Mo.), 29 Fed. Supp. 810; *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* (D. C.-Pa.), 31 Fed. Supp. 403.

In an action in personam brought in the southern district of California by a resident of that district against a resident of Oklahoma solely on the basis of diversity of citizenship, service had on the defendant in the northern district of California is invalid. *Melekov v. Collins* (D. C.-Cal.), 30 Fed. Supp. 159.

Rule 4 (f) must be construed in a manner not conflicting with 7 F. C. A., Title 28, § 112; U. S. C. A., Title 28, § 112; id. U. S. C. *Melekov v. Collins* (D. C.-Cal.), 30 Fed. Supp. 159.

In the exercise of discretion, the court entertained a motion to quash summons which was served on a nonresident defendant beyond the limits of the state although the motion was filed several days after time to answer had expired. *Koncowicz v. East Liverpool City Hosp.* (D. C.-Pa.), 31 Fed. Supp. 122.

19. Affidavit of Service upon an Individual by a Person Specially Appointed.

STATE OF ———, }
COUNTY OF ———. } ss:

John Doe, being duly sworn, says:

He is the person specially appointed by order of this court dated ———, 19——, to make service of the summons and complaint herein on ———, the defendant (one of the defendants) in this action, and on the ——— day of ———, 19——, he made said service

1. By delivering a copy of the summons and of the complaint to the said defendant personally at ———,

2. By leaving a copy of the summons and of the complaint at his dwelling-house or usual place of abode at ——— with Richard Roe, a person of suitable age and discretion then residing therein,

3. By delivering a copy of the summons and of the complaint at ——— to John Smith, an agent authorized by appointment (by law) to receive service of process.

John Doe.

Subscribed and sworn to before me, a ——— this ——— day of ———, 19——.

[SEAL]

Name.

Official character.

Note.

Use par. 1, 2, or 3 according to the manner in which service was made.

Cross-Reference.

See notes to Forms 15, 18.

Federal Rules of Civil Procedure.

"The person serving the process shall make proof of service thereof to the court promptly and in any event within

the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service." Rule 4 (g).

NOTE OF ADVISORY COMMITTEE TO RULE 4 (g): "With the second sentence compare Equity Rule 15 (Process, by Whom Served)."

NOTES TO DECISIONS

Return of Service [Rule 4 (g)].

In an action against a nonresident for damages resulting from an automobile accident, in which service was made on defendant by registered mail as per-

mitted by state statute, failure to file the registry return receipt as required by the state statute does not invalidate the service. *Peeples v. Ramspacher* (D. C.-S. C.), 29 Fed. Supp. 632.

20. Affidavit of Service upon a Corporation, Partnership, or Unincorporated Association.

(Caption.)

STATE OF ———, }
COUNTY OF ———. } ss:

John Doe, being first duly sworn, says that he is the person appointed by order of this court dated ———, 19——, to serve the summons and

complaint herein upon The AB Co., the defendant (one of the defendants) in this action and that on the — day of —, 19—, he made service thereof upon the said defendant by delivering a copy of the summons and of the complaint at — to John Smith (the —), (the managing agent), (the general agent) of The AB Co., (an agent authorized by appointment (law) to receive service upon The AB Co.) (and also by mailing copies of said summons and complaint to The AB Co.).

John Doe.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

Name.

Official character.

Notes.

If the person served is an officer of the defendant, insert his title.

The last clause is to be used only if service is made upon an agent authorized by statute to receive service and if such statute requires that a copy be mailed to the defendant.

Cross-References.

See notes to Form 15.

See Rule 4 (d) (3) and 4 (d) (7) as set out under Form 18.

See Rule 4 (g) as set out under Form 19.

Statutory Reference.

The return of service on the defendant in an action against a nonresident corporate surety, when such service is made on the clerk of court, must contain a statement that a copy of the process was transmitted by mail to the defendant, 2 F. C. A., Title 6, § 7; U. S. C. A., Title 6, § 7; id. U. S. C.

NOTES TO DECISIONS

Agent of Foreign Corporation.

Jurisdiction over a corporation of one state can not be acquired in another state or district in which it has no place of business, and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company. *James-Dickinson Farm Mtg. Co. v. Harry*, 273 U. S. 119, 71 L. ed. 569, 47 Sup. Ct. 308.

An agent who solicits business within the district is not a representative of the corporation in the sense that he may receive service of process in the district. *Weller v. Pennsylvania R. Co. (C. C. Colo.)*, 113 Fed. 502.

Person openly acting as agent was properly served with process under 7 F. C. A., Title 28, § 109; U. S. C. A., Title 28, § 109; id. U. S. C. *Henderson v. Richardson Co. (C. C. A. 4)*, 25 Fed. (2d) 225.

Service on defendant's agent whose function was to take orders for goods subject to approval by defendant residing in another state did not confer juris-

diction under 7 F. C. A., Title 28, § 109; U. S. C. A., Title 28, § 109; id. U. S. C. *Hoegger v. F. H. Lawson & Co. (D. C.-N. Y.)*, 35 Fed. (2d) 219.

Service of process on an agent of a foreign corporation who is denominated "General Manager" for purposes of business negotiations is valid service on the corporation, even though the latter claims that person served was in fact only "a sales representative." *Cohen v. Physical Culture Shoe Co. (D. C.-N. Y.)*, 28 Fed. Supp. 679.

Amendment of Return on Corporation.

Return of summons served on officer of corporation is amendable. *United States v. Standard Oil Co. of Indiana (D. C.-Tenn.)*, 154 Fed. 728.

Doing Business within State.

Service of summons and complaint upon a foreign corporation by delivering copies thereof to an officer of the corporation is not effective unless the corporation is doing business within the state.

Pioneer Utilities Corp. v. Scott-Newcomb, Inc. (D. C.-N. Y.), 26 Fed. Supp. 616.

Service on Agent of Unincorporated Association.

A chairman or officer of a local union is not a representative of the international union, for the service of process. *Christian v. International Assn. of Machinists* (D. C.-Ky.), 7 Fed. (2d) 481.

Service may be had upon any agent or representative of an unincorporated association whose character in relation

to the association is such that it could be reasonably expected that he would give notice of the suit to his association. *Operative Plasterers & Cement Finishers International Assn. v. Case*, 68 App. D. C. 43, 93 Fed. (2d) 56.

The secretary and treasurer of a labor organization was not an officer of the organization for the service of summons where there was nothing in the statutes of the organization which would make him such an agent. *Singleton v. Order of Railway Conductors* (D. C.-Ill.), 9 Fed. Supp. 417.

21. Affidavit of Service upon the United States.

(Caption.)

STATE OF _____, }
COUNTY OF _____. } ss:

John Doe, being first duly sworn, says that he is the person appointed by order of this court, dated _____, 19____, to serve the summons and complaint herein upon the United States, the defendant (one of the defendants) in this action, and that on the _____ day of _____, 19____, he made service thereof upon the said defendant by delivering a copy of the summons and of the complaint at _____ to _____, United States attorney for the _____ District of _____ (an assistant United States attorney, _____ District of _____) (a clerical employee designated by the United States attorney for the _____ District of _____, in writing filed with the clerk of this court) and by sending a copy of the summons and of the complaint by registered mail to the attorney-general of the United States at Washington, D. C. (and by also sending a copy of the summons and of the complaint by registered mail to _____).

John Doe.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL]

Name.

Official character.

Note.

The last clause is to be used only if the action attacks the validity of an order of an officer or agency of the United States, in which event the name and title of such officer or the name of such

agency, as the case may be, should be inserted.

Cross-Reference.

See notes to Forms 15, 18, and 19.

NOTES TO DECISIONS

Failure to Mail Copy to Attorney-General.

Failure to mail copy of petition and citation in suit on war risk insurance

policy to the attorney-general, and to file certificate showing that same had been done, was not a jurisdictional defect, but merely ground for a stay of

proceedings until the requirement could be complied with. *Little v. United States* (D. C.-La.), 54 Fed. (2d) 711.

Failure of plaintiff to send a copy of the petition by registered mail to the attorney-general and file an affidavit with the clerk, pursuant to 8 F. C. A., Title 28, § 763; U. S. C. A., Title 28, § 763; *id.* U. S. C., was waived when United States attorney made a general appearance and pleaded to the merits. *Wilhelm v. United States* (D. C.-N. C.), 18 Fed. Supp. 600.

Tucker Act Superseded.

The manner of making service upon the United States prescribed by Rule 4 (d) (4) supplants the provisions of the Tucker Act relating to commencing an action against the United States. *United States to the Use of and for the Benefit of Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

22. Affidavit of Service upon an Officer or Agency of the United States.

(Caption.)

STATE OF ———, }
COUNTY OF ———. } ss:

John Doe, being first duly sworn, says that he is the person appointed by order of this court, dated ———, 19—, to serve the summons and complaint herein upon AB, the defendant (one of the defendants) in this action and that on the ——— day of ———, 19—, he made service thereof upon the said defendant by serving the United States, to wit, by delivering a copy of the summons and of the complaint at ——— to ——— (United States attorney for the ——— District of ———) (an assistant United States attorney, ——— District of ———) (a clerical employee designated by the United States attorney for the ——— District of ———, in writing filed with the clerk of this court) and by sending a copy of the summons and of the complaint by registered mail to the attorney-general of the United States at Washington, D. C.; and also by delivering a copy of the summons and of the complaint to (AB).

John Doe.

Subscribed and sworn to before me this ——— day of ———, 19—.

[SEAL]

Name.

Official character.

Cross-Reference.

See notes to Forms 15, 18, and 19.

23. Affidavit of Service upon a Corporation which is an Agency of the United States.

(Caption.)

STATE OF ———, }
COUNTY OF ———. } ss:

John Doe, being first duly sworn, says that he is the person appointed by order of this court, dated ———, 19—, to serve the summons and

complaint herein upon The AB Corporation, the defendant (one of the defendants) in this action, and that on the — day of —, 19—, he made service thereof upon the said defendant by serving the United States, to wit, by delivering a copy of the summons and of the complaint at — to —, United States attorney for the — District of — (an assistant United States attorney, — District of —) (a clerical employee designated by the United States attorney for the — District of —, in writing filed with the clerk of this court) and by sending a copy of the summons and of the complaint by registered mail to the attorney-general of the United States at Washington, D. C., and also by delivering a copy of the summons and of the complaint at — to — (the —) (the managing agent) (the general agent) of The AB Corporation (an agent authorized by appointment (law) to receive service upon The AB Corporation) (and also by mailing copies of said summons and complaint to The AB Corporation).

John Doe.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

Name.

Official character.

Note.

If the person served is an officer of the defendant corporation, insert his title.

Cross-Reference.

See notes to Forms 15, 18, and 19.

24. Affidavit of Service upon a State or Municipal Corporation.

(Caption.)

STATE OF —, }
COUNTY OF —. } ss:

John Doe, being first duly sworn, says that he is the person appointed by order of this court, dated — —, 19—, to serve the summons and complaint herein upon —, the defendant (one of the defendants) in this action and that on the — day of —, 19—, he made service thereof upon the said defendant by delivering a copy of the summons and of the complaint at — to John Smith, the —, of —.

John Doe.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

Name.

Official character.

Notes.

Insert title of the chief executive officer of the defendant corporation or other governmental organization sued.

If the service of the summons and complaint is made in the manner prescribed by the law of the state for the service of such process upon such de-

pendant, the affidavit should show that the service was made in such manner.

Cross-Reference.

See notes to Forms 15, 18, and 19.

25. Motion for Order for Service upon Absent Defendant in Action Involving Title to Property.

(Caption.)

The plaintiff moves the court for an order directing John Doe, the defendant (one of the defendants) in this action to appear, plead, or answer herein in accordance with the provisions of section 738 of the Revised Statutes of the United States (U. S. C., Title 28, section 118) on the grounds that this is an action to enforce a lien upon (to enforce a claim to) (to remove an encumbrance (a lien) (a cloud) upon the title to) real (personal) property located within this district, to wit: [Enter description and location of property]; that said defendant is not an inhabitant of this district but is an inhabitant of the — District of — and resides at — Street, —, —; that the marshal returned the summons issued in this case indorsed, "The defendant, John Doe, was not found in this district"; and that said defendant has not voluntarily appeared herein.

Attorney for plaintiff.

Address.

Cross-Reference.

See notes to Form 15.

Statutory References.

An order may be made by the court for service upon a party not an inhabitant of and not found within the district, in actions to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon, the title to real or personal property within the district where such action is brought, 7 F. C. A., Title 28, § 118; U. S. C. A., Title 28, § 118; id. U. S. C.

Service of court order in lieu of summons may also be used in an action on a veteran's contract of insurance, to obtain jurisdiction over other claimants who are not inhabitants of or found within the district in which the action is brought, 11 F. C. A., Title 38, § 445; U. S. C. A., Title 38, § 445; id. U. S. C.

Federal Rules of Civil Procedure.

"Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a

party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order." Rule 4 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 4 (e): "The provisions for the service of a summons or of notice or of an order in lieu of summons contained in U. S. C., Title 8, § 405 (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with state law); U. S. C., Title 28, § 118 (Absent defendants in suits to enforce liens); U. S. C., Title 35, § 72a (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); U. S. C., Title 38, § 445 (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the district may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 of the Code of the

District of Columbia (Publication against non-resident; those absent for six months; unknown heirs or devisees; for

divorce or in rem; actual service beyond District) is continued by this rule."

NOTES TO DECISIONS

Effect of Service of Subpoenas.

In a local suit, officers of nonresident defendants and trustee of nonresident common-law trust were not brought into court personally by service of subpoenas on them. *Ferdig Oil Co. v. Wilson* (C. C. A. 10), 91 Fed. (2d) 857.

Other Service.

The secretary of state of New York is an agent authorized by law to receive service of process for a nonresident operating an automobile on a public highway in New York. *Clancy v. Balacier* (D. C. N. Y.), 27 Fed. Supp. 867.

26. Affidavit for Order for Service upon Absent Defendant in Action Involving Title to Property.

(Caption.)

STATE OF _____, }
COUNTY OF _____. } ss:

AB, being first duly sworn, says:

1. He is attorney for plaintiff in this action.
2. This is an action to enforce a lien upon (to enforce a claim to) (to remove an encumbrance (a lien) (a cloud) upon the title to) real (personal) property located within this district, to wit: [describe and locate property].
3. John Doe, the defendant herein, is not an inhabitant of this district but resides in the _____ District of _____, at _____ Street, _____, _____.
4. The marshal for this district returned the summons issued herein, indorsed, "The defendant, John Doe, was not found in this district."
5. Said defendant has not voluntarily appeared herein.

AB.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL]

Name.

Official character.

Cross-Reference.

See notes to Forms 15, 25.

27. Order for Service upon Absent Defendant in Action Involving Title to Property.

(Caption.)

It appearing from the affidavit of XY, verified on the _____ day of _____, 19____, that this is an action to enforce a lien upon (to enforce a claim to) (to remove an encumbrance (a lien) (a cloud) upon the title to) real

(personal) property located within this district and that John Doe, the defendant (one of the defendants) herein is not an inhabitant of and was not found within this district and that said defendant has not voluntarily appeared herein, it is on motion of AB, attorney for plaintiff,

Ordered that said defendant appear, plead, or answer herein by the — day of —, 19—, and if he fails to do so judgment by default may be taken against him, and it is further

Ordered that copies of this order be served upon said defendant wherever found and upon the person or persons in possession or charge of said property.

District judge.

Date—.

Cross-Reference.

See notes to Forms 15, 25.

NOTES TO DECISIONS

Form of Order.

An order that "service of process upon said AB, defendant, be made by the marshal of the — District of the state of —, and in default thereof, that service be made by publication," is defective; the order must require the defendant "to appear, plead, answer, or demur," by a

day certain to be designated. *Jennings v. Johnson* (C. C. A. 5), 148 Fed. 337.

Order for appearance, directing service of a "certified" copy thereof, was sufficiently complied with by service of a duly attested copy. *Doherty v. McDowell* (D. C.-Me.), 276 Fed. 728.

28. Affidavit of Personal Service of Order on Absent Defendant in Action Involving Title to Property.

(Caption.)

STATE OF —, }
COUNTY OF —. } ss:

AB, being first duly sworn, says that he is, over the age of — years; that on the — day of —, 19—, he served the order of this court, dated — —, 19—, directing John Doe, defendant in this action, to appear, plead, or answer herein, on the said defendant by delivering a copy of said order to him personally at —.

AB.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

Name.

Official character.

Cross-Reference.

See notes to Forms 15, 19, and 25.

NOTES TO DECISIONS

Service on Nonresident Trustee.

Service on nonresident trustee having power to sell land in the district did not

confer jurisdiction of suit to determine interest in land. Fuller v. Peabody (C. C. A. 6), 1 Fed. (2d) 965.

29. Affidavit of Personal Service of Order on Person in Possession in Action Involving Title to Property.

(Caption.)

STATE OF ———, }
COUNTY OF ———. } ss:

AB, being first duly sworn, says that he is over the age of ——— years; that on the ——— day of ———, 19—, he served the order of this court, dated ———, 19—, directing John Doe, defendant in this action to appear, plead, or answer herein, on Richard Roe, the person in possession of the property involved in this action, by delivering a copy of said order to him personally at ———.

AB.

Subscribed and sworn to before me this ——— day of ———, 19—.

[SEAL]

Name.

Official character.

Cross-Reference.

See notes to Forms 15, 19, and 25.

30. Motion for Service by Publication.

(Caption.)

The plaintiff moves the court to direct that the order of this court dated ———, 19—, directing John Doe, the defendant (one of the defendants) in this action, to appear, plead, or answer herein, be served upon the said defendant by publication in accordance with the provisions of section 738 of the Revised Statutes of the United States (U. S. C., Title 28, section 118) on the ground that personal service of said order upon the said defendant is not practicable.

Attorney for plaintiff.

Cross-Reference.

See notes to Forms 15, 25.

Statutory Reference.

Notice by publication, 7 F. C. A., Title 28, § 118; U. S. C. A., Title 28, § 118; id. U. S. C.

31. Affidavit for Order for Service by Publication on Absent Defendants.

(Caption.)

STATE OF _____, }
COUNTY OF _____ } ss:

AB, being first duly sworn, says:

1. He is the attorney (one of the attorneys) for the plaintiff herein and resides at _____.

2. This is an action to enforce a claim to real property located in this district, to wit: [Describe and locate property].

3. John Doe, defendant (one of the defendants) in this action is not an inhabitant of and has not been found within this district and said defendant has not voluntarily appeared herein. The marshal returned summons herein, indorsed "The defendant _____ is not found in my district." The last-known address of said defendant was _____, but said defendant has long since removed from such address. Diligent inquiry has been made to ascertain the present whereabouts of said defendant as follows: [Here set forth in detail the inquiry that was made]. The present whereabouts of said defendant has not been ascertained. Personal service upon the said defendant of the order of this court, dated _____, 19____, directing said defendant to appear, plead, or answer herein, is not practicable.

AB.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL]

Name.

Official character.

Cross-Reference.

See notes to Forms 15, 25.

NOTES TO DECISIONS

Requirements for Service by Publication.

In order to warrant an order for service by publication the applicant should distinctly state the known places of residence of the nonresident defendant, or show the diligence used to ascertain the

places of residence, when unknown, in order that the court may have before it the data to direct personal service in the one case and publication of the order in the other. *Batt v. Procter* (C. C.-Tex.), 45 Fed. 515.

32. Order for Service by Publication on Absent Defendants in Action Involving Title to Property.

(Caption.)

It appearing by the affidavit of XY, verified on _____ day of _____, 19____, that this is an action to enforce a lien on real property located in this

district, and due diligence was used to ascertain the present whereabouts of John Doe, the defendant (one of the defendants) herein, but that the same can not be ascertained, and that personal service on said defendant is not practicable, it is,

On motion of AB, attorney for plaintiff,

Ordered, that said defendant appear, plead, or answer herein by the — day of —, 19—, and if he fails to do so, judgment by default may be taken against him; and it is further

Ordered that this order be published in —, once a week for six consecutive weeks.

District judge.

Date—.

Cross-Reference.

See notes to Forms 15, 25.

33. Proof of Publication of Order in Lieu of Summons in Action Involving Title to Property.

(Caption.)

(Copy of the advertisement.)

STATE OF —, }
COUNTY OF —. } ss:

AB, being first duly sworn, says that he is the publisher of —, a newspaper published in the county of —, state of —; that the within advertisement was published in said newspaper once a week for six consecutive weeks; and that the first publication of said advertisement was in the issue of said newspaper on the — day of —, 19—.

AB.

Subscribed and sworn to before me this — day of —, 19—.

L]

Name.

Official character.

s-Reference.

See notes to Forms 15, 19, and 25.

NOTES TO DECISIONS

Proof of Publication.

A full discussion of the requirements of the statute providing for service upon absent defendants is found in *Perez v. Fernandez*, 220 U. S. 224, 55 L. ed. 443, 31 Sup. Ct. 224.

An order of publication is not authorized except where personal service of the

order requiring the absent defendant to appear and plead is not practicable. *Perez v. Fernandez*, 220 U. S. 224, 55 L. ed. 443, 31 Sup. Ct. 224; *Hicks v. Crawford Coal & Iron Co. (C. C.-Tenn.)*, 190 Fed. 334.

CHAPTER 3

GUARDIAN AD LITEM

Form

- 40. Application for appointment of a guardian ad litem.
- 41. Order appointing guardian ad litem.
- 42. Petition by plaintiff for appointment of a guardian ad litem for an infant defendant.

Form

- 43. Petition by infant defendant for appointment of guardian ad litem.
- 44. Notice of hearing on petition for appointment of guardian ad litem.
- 45. Consent to serve as guardian ad litem and acknowledgment.
- 46. Order appointing guardian ad litem.

INTRODUCTION.—Rule 17 (c) contains authority for the court to appoint a guardian ad litem for an infant or incompetent person not otherwise represented. A federal court may make a designation of a guardian ad litem only in the event that no representative has been appointed by a state court having jurisdiction. *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co.* (D. C.-N. Y.), 27 Fed. Supp. 485; *Ballard v. United Distillers Co., Inc.* (D. C.-Ky.), 28 Fed. Supp. 633.

40. Application for Appointment of a Guardian ad Litem.

District Court of the United States

———— District of ————

In the matter of the application of
John Doe for the appointment of a } Civil No. ———
guardian ad litem. } Petition

1. Petitioner is the father of Mary Doe who is ——— years of age and resides with her parents at ———. The said infant does not have a duly-appointed representative.

2. The said infant has a cause of action against ——— in that [here set forth briefly the infant's cause of action].

3. Petitioner is a competent and responsible person to become the guardian of said infant for the purpose of prosecuting said cause of action.

Wherefore, petitioner prays that he be appointed guardian ad litem of said infant to prosecute said cause of action for her.

John Doe.
Petitioner.

Note.

Local rules should be consulted for special allegations. For instance, if the application is made in the Southern District of New York, a statement that "no previous application has been made for

the relief applied for herein" or a similar allegation should be added, see Rule 5 of the Rules of the United States District Court for the Southern District of New York.

Cross-Reference.

Advisory notes to Rule 17 (c), see Form 56.

Federal Rules of Civil Procedure.

"Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If

an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." Rule 17 (c).

41. Order Appointing Guardian ad Litem.

District Court of the United States

_____ District of _____

In the matter of the application of
John Doe for appointment of a } Civil No. ____
guardian ad litem.

It appearing from the annexed petition of _____, dated _____, 19____, that John Doe is the father of Mary Doe, an infant, residing with her parents at _____; that said infant, has a cause of action against _____ and does not have a duly-appointed representative; and that the said John Doe is a competent and responsible person to prosecute said cause of action as her guardian ad litem.

On motion of _____, attorney for petitioner, it is

Ordered that John Doe is hereby appointed guardian ad litem for Mary Doe, an infant, and authorized to prosecute in her behalf the cause of action mentioned in the annexed petition.

United States district judge.

Note.

If the appointment of a guardian ad litem is sought for a party to a pending action, the petition and order should re-

cite such facts and bear the caption of such action.

Cross-Reference.

See notes to Form 40.

42. Petition by Plaintiff for Appointment of a Guardian ad Litem for an Infant Defendant.

(Caption.)

Plaintiff herein respectfully shows:

1. That this is an action to foreclose a mortgage executed by _____, defendant's father, now deceased, and that defendant claims an interest in the mortgaged premises as heir at law of the said mortgagor.

2. That on the _____ day of _____, 19____, the summons and complaint herein were served on defendant.

3. That plaintiff is informed that defendant is an infant of not more than — years of age.

Wherefore, plaintiff prays that some competent and suitable person be appointed guardian ad litem, to appear and defend this action on behalf of the said infant defendant.

Plaintiff.

Address.

(Verification.)

Cross-Reference.

See notes to Form 40.

43. Petition by Infant Defendant for Appointment of Guardian ad Litem.

(Caption.)

Petitioner is the defendant herein and respectfully shows:

1. That this is an action to foreclose a mortgage alleged to have been executed by — petitioner's father, now deceased. Petitioner claims an interest in the premises alleged to have been so mortgaged, as an heir at law of the alleged mortgagor.

2. That on the — day of —, 19—, petitioner was served with a copy of the summons and complaint herein.

3. That petitioner is an infant of — years of age.

4. That — of — Street, —, — is [here state his qualifications].

Wherefore, petitioner prays that — of — Street, —, —, be appointed as guardian ad litem to appear and defend this action on behalf of said petitioner.

Petitioner.

(Verification.)

Cross-Reference.

See notes to Form 40.

44. Notice of Hearing on Petition for Appointment of Guardian ad Litem.

(Caption.)

To —
Attorney for plaintiff.

Address.

Please take notice that the attached petition for the appointment of a guardian ad litem for —, one of the defendants herein, will be brought

on for hearing before this court at room No. —, [insert name and location of building] on the — day of —, 19—, at — —. M. of said day or as soon thereafter as counsel can be heard.

Attorney for defendant.

Address.

Date—.

Cross-Reference.

See notes to Form 40.

45. Consent to Serve as Guardian ad Litem and Acknowledgment.

(Caption.)

I hereby consent to act as guardian ad litem for — infant defendant in this action.

John Doe.

Date—.

STATE OF —, }
COUNTY OF —. } ss:

On this — day of —, 19—, personally appeared John Doe, known to me to be the person who executed the foregoing consent, and duly acknowledged that he executed the same.

A.B.

Official character.

Cross-Reference.

See notes to Form 40.

46. Order Appointing Guardian ad Litem.

(Caption.)

This cause came on for hearing on the petition of —, one of the defendants herein, for the appointment of a guardian ad litem and it appearing to the court that said defendant is an infant of — years of age and that John Doe is a competent and responsible person and that he has consented to act as such guardian ad litem, it is

Ordered that the said John Doe be and he is hereby appointed guardian ad litem for the said — and is authorized and directed to appear and defend the above-entitled action on behalf of the said —.

United States district judge.

Date—.

Cross-Reference.

See notes to Form 40.

CHAPTER 4

COMPLAINTS

Section

1. Pleading and Practice in General, Forms 55, 56.
2. Allegations of Jurisdiction, Forms 59 to 75.
 - A. Diversity of Citizenship and amount in controversy, Forms 59 to 68.
 - B. Federal question and amount in controversy, Forms 69 to 72.

Section

2. Allegations of Jurisdiction, Forms 59 to 75—Continued.
 - C. Action by the United States, Forms 73, 74.
 - D. Action against the United States, Form 75.
3. Claims for Relief, Forms 78 to 117.
4. Special Allegations, Forms 120 to 126.

SECTION 1

PLEADING AND PRACTICE IN GENERAL

Form

55. Affidavit in forma pauperis.

Form

56. Order of court in forma pauperis.

INTRODUCTION.—The basic principles of pleading underlying the Federal Rules of Civil Procedure are simplicity, conciseness, and freedom from technical forms. The complaint must set forth: First, a short and plain statement of the grounds on which the court's jurisdiction depends; second, a short and plain statement of the claim showing that the plaintiff is entitled to relief, and third, a demand for judgment. Two or more statements of a claim may be set forth alternatively or hypothetically, either in one count or in separate counts. Each claim founded on a separate transaction should be stated in a separate count. All averments should be made in numbered paragraphs.

The caption of the complaint must include the names of all the parties. In subsequent pleadings, it is sufficient to state the name of the first party on each side, with an appropriate indication of other parties. Every pleading must be signed by an attorney of record in his individual name, whose address must be stated. His signature is a certificate that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. Verification by oath is not required, except in an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, and in an action against the United States under the Tucker Act. In an action in which application is made for a temporary restraining order, the complaint may be verified, in which event, the verified complaint has the effect of an affidavit.

In averring grounds of jurisdiction it must be borne in mind that jurisdiction of the United States District Courts is of two kinds: First, jurisdiction dependent on the character of the parties; second, jurisdiction dependent on the character of the subject-matter. The principal group of cases comprised within the first category includes those involving diversity of citizenship, i. e., suits between citizens of different states or between citizens of a state and foreign states, citizens, or subjects. In such cases, the matter in controversy must exceed, exclusive of interest and costs, the sum or value of \$3,000 in order that jurisdiction of the federal courts may be invoked. If suit is brought by an assignee of a chose in action, the requisite diversity of citizenship is required as between the original assignor of the claim and the defendant or defendants. Suits by the United States or by an officer thereof are also cognizable in the District Courts of the United States, as well as suits between citizens of the same state claiming lands under grants from different states, suits by aliens for torts in violation of the law of nations or of a treaty of the United States, and suits against consuls and vice-consuls.

The District Courts likewise have jurisdiction of claims against the United States not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied in fact, with the government of the United States, in cases not sounding in tort.

The second branch of federal jurisdiction, that based on the character of the subject-matter, comprises suits arising under the Constitution or laws of the United States or treaties made by the United States. The minimum jurisdictional amount of \$3,000, exclusive of interest or costs, must be present in such cases. It also includes cases of admiralty and maritime jurisdiction, cases arising under patent, copyright, and trademark laws, as well as cases under other specified federal statutes. No jurisdictional amount is required in this group of cases.

The following are the principal rules governing venue: An action must be brought in the district of the defendant's residence, except that if the jurisdiction is founded solely on the fact that the action is between citizens of different states, suit may be brought in the district of either the plaintiff's or the defendant's residence. If there are two or more defendants residing in different districts of the same state, suit may be brought in either district. If a district contains two or more divisions, suit must be brought in the division where the defendant resides, but if there are two or more defendants residing in different divisions, suit may be brought in either division. A patent suit may be brought either in the district of the defendant's residence or in any district in which he has committed acts of infringement and has a regular and established place of business. A suit against the United States on a veteran's insurance contract may be brought either in the district of the plaintiff's residence or in the District of Columbia. Averments showing venue are no longer required in a complaint, as lack of venue must be asserted affirmatively by the defendant.

A summons may be served anywhere within the state in which the District Court is held and is not limited to the confines of the district in which the suit is brought. There are certain specific cases, however, in which process may run outside of the state.

The forms of complaints here presented are drawn as simply and briefly as possible. This is believed to be in the spirit of the rules. While they are not intended to be exhaustive, but merely suggestive, they include all forms drafted by the Advisory Committee of the Supreme Court, as well as forms prepared by the authors. In addition, there are included a number of official forms prescribed in England and in New Jersey, as they are exceedingly brief and simple and yet are believed to satisfy the requirements of the Federal Rules of Civil Procedure.

55. Affidavit in Forma Pauperis.

District Court of the United States

_____ District of _____

_____ Division

_____	}	Civil No. _____

v.		

Affidavit of _____

_____ of _____ }
 _____ of _____ } ss:

_____, being duly sworn according to law deposes and says that —he is the _____ in the above-entitled action; that —he is a citizen of the United States; that a statement of his assets and liabilities is annexed; that his income is only _____ dollars (\$_____) per _____, derived from _____; that because of h— poverty —he is unable to pay the costs of said action or to give security therefor; that said action is [set forth briefly nature of the claim for relief or the defense] and that he believes that he is entitled to prosecute (defend) said action.

Sworn to and subscribed before me this _____ day of _____, 19____.

Statutory Reference.

Suits and proceedings by poor persons,
 8 F. C. A., Title 28, § 832; U. S. C. A.,
 Title 28, § 832; id. U. S. C.

NOTES TO DECISIONS

In General.

The statement under oath in writing must be made by the party himself. *Pothier v. Rodman*, 261 U. S. 307, 67 L. ed. 670, 43 Sup. Ct. 374.

An affidavit in forma pauperis which states the amount of the security for costs demanded, and that "she is unable to give security for said costs," is not sufficient. The assertion of poverty may be relative and not absolute. The affidavit should be sufficient to base an in-

dictment for perjury, if false. *Woods v. Bailey* (C. C.-Pa.), 111 Fed. 121.

A party desiring to prosecute in forma pauperis an appeal in a habeas corpus proceeding must apply for such privilege to the District Court before filing a notice of appeal. If the application is denied for any reason other than lack of good faith, it may be presented to the Circuit Court of Appeals. *Smith v. Johnston* (C. C. A. 9), 109 Fed. (2d) 152.

56. Order of Court in Forma Pauperis.

It is Ordered that — the — in the above-entitled action be and — he hereby is permitted to — said action to conclusion without prepayment of fees or costs.

District judge.

Dated——.

Cross-References.

See notes to Form 55.

Advisory notes to Rule 17 (b), see Form 2; Rule 22, see Form 222.

Capacity to sue, Form 120.

Conditions precedent, Form 121.

Judgments, Form 123.

Official documents and acts, Form 122.

Omission of parties, Form 124.

Parties generally, Form 315, and notes thereto.

Special damage, Form 126.

Statutory References.

Defects in form immaterial, 8 F. C. A., Title 28, § 777; U. S. C. A., Title 28, § 777; id. U. S. C.

Joinder of nonresident defendants, 7 F. C. A., Title 28, § 111; U. S. C. A., Title 28, § 111; id. U. S. C.

Jurisdiction, 7 F. C. A., Title 28, §§ 41 to 53; U. S. C. A., Title 28, §§ 41 to 53; id. U. S. C.

Venue, 7 F. C. A., Title 28, §§ 111 to 113, 115 to 125; U. S. C. A., Title 28, §§ 111 to 113, 115 to 125; id. U. S. C.

Federal Rules of Civil Procedure.

"There shall be one form of action to be known as 'civil action.'" Rule 2.

"A civil action is commenced by filing a complaint with the court." Rule 3.

"There shall be a complaint and an answer; and there shall be a reply, if the

answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." Rule 7 (a).

"A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded." Rule 8 (a).

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

"(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate

3999

counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11." Rule 8 (e).

"Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all parties, * * *." Rule 10 (a).

"All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth." Rule 10 (b).

"Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Rule 10 (c).

"Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If

a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted." Rule 11.

"Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." Rule 17 (a).

"The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." Rule 17 (b).

"Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." Rule 17 (c).

"The plaintiff in his complaint * * * may join either as independent or as

alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. * * * Rule 18 (a).

"Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money." Rule 18 (b).

"Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff." Rule 19 (a).

"When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons." Rule 19 (b).

"All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All per-

sons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities." Rule 20 (a).

"The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice." Rule 20 (b).

"(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. * * * The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24(26) of the Judicial Code, as amended, U. S. C., Title 28, § 41(26). * * * Rule 22.

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Rule 23 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 2: "1. This rule modifies U. S. C., Title 28, § 384 (Suits in equity, when not sustainable). U. S. C., Title 28, §§ 723 and 730 (conferring power on the Supreme Court to make rules of practice in equity), are unaffected in so far as they relate to the rule making power in admiralty. These sections, together with § 723b (Rules in actions at law; Supreme Court authorized to make) are continued in so far as they are not inconsistent with § 723c (Union of equity and action at law rules; power of Supreme Court). See Note 3 to Rule 1. U. S. C., Title 28, §§ 724 (Conformity act), 397 (Amendments to pleadings when case brought to wrong side of court) and 398 (Equitable defenses and equitable relief in actions at law) are superseded.

"2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

"3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N. Y. Code 1848 (Laws 1848, ch. 379) § 62; N. Y. C. P. A. (1937) § 8; Calif. Code Civ. Proc. (Deering, 1937) § 307; 2 Minn. Stat. (Mason, 1927) § 9164; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 153, 255."

NOTE OF ADVISORY COMMITTEE TO RULE 3: "1. Rule 5 (e) defines what constitutes filing with the court.

"2. This rule governs the commencement of all actions, including those brought by or against the United States or an officer or agency thereof, regardless of whether service is to be made personally pursuant to Rule 4 (d), or otherwise pursuant to Rule 4 (e).

"3. With this rule compare Equity Rule 12 (Issue of Subpoena—Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:

"U. S. C., Title 28:

§ 45 (District courts; practice and procedure in certain cases under interstate commerce laws)

§ 762 (Petition in suit against United States)

§ 766 (Partition suits where United States is tenant in common or joint tenant)

"4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4 (a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4 (a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising."

NOTE OF ADVISORY COMMITTEE TO RULE 7 (a): This preserves the substance of Equity Rule 31 (Reply—When Required—When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 23, r. r. 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O. 21). See O. 21, r. r. 1-14; O. 27, r. 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. 1 Colo. Stat. Ann. (1935) § 66; Ore. Code Ann. (1930) §§ 1-614, 1-616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. N. C. Code Ann. (1935) § 525; 1 S. D. Comp. Laws (1929) § 2357. A reply to a counterclaim is usually re-

quired. Ark. Civ. Code (Crawford, 1934) §§ 123-125; Wis. Stat. (1935) §§ 263.20, 263.21. U. S. C., Title 28, § 45 (District courts; practice and procedure in certain cases) is modified in so far as it may dispense with a reply to a counterclaim.

"For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

"All statutes which use the words 'petition,' 'bill of complaint,' 'plea,' 'demurrer,' and other such terminology are modified in form by this rule."

NOTE OF ADVISORY COMMITTEE TO RULE 8 (a): "See Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). Compare 2 Ind. Stat. Ann. (Burns, 1933) §§ 2-1004, 2-1015; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11305, 11314; Utah Rev. Stat. Ann. (1933) §§ 104-7-2, 104-9-1.

"See Rule 19 (c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

"See Rule 23 (b) for particular requirements as to the complaint in a secondary action by shareholders."

NOTE OF ADVISORY COMMITTEE TO RULE 8 (e): "This rule is an elaboration upon Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. Compare also Equity Rule 18 (Pleadings—Technical Forms Abrogated). See Clark, Code Pleading (1928), pp. 171-4, 432-5; Hankin, Alternative and Hypothetical Pleading (1924), 33 Yale L. J. 365."

NOTE OF ADVISORY COMMITTEE TO RULE 10: "The first sentence is derived in part from the opening statement of Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn. Gen. Stat. (1930) § 5513; Ill. Rev. Stat. (1937) ch. 110, § 157 (2); N. Y. R. C. P. (1937) Rule 90. For incorporation by reference, see N. Y. R. C. P. (1937) Rule 90. For written instruments as exhibits, see Ill. Rev. Stat. (1937) ch. 110, § 160."

NOTE OF ADVISORY COMMITTEE TO RULE 11: "This is substantially the content of Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare Equity Rule 36 (Officers Before Whom

Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and Great Australian Gold Mining Co. v. Martin, L. R. 5 Ch. Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn. Stat. (Mason, 1927) § 9265; N. Y. R. C. P. (1937) Rule 91; 2 N. D. Comp. Laws Ann. (1913) § 7455.

"This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

"U. S. C., Title 28:

§ 381 (Preliminary injunctions and temporary restraining orders)

§ 762 (Suit against the United States)

"U. S. C., Title 28, § 829 (Costs; attorney liable for, when) is unaffected by this rule.

"For complaints which must be verified under these rules, see Rule 23 (b) (Secondary Action by Shareholders) and 65 (Injunctions).

"For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa. Stat. Ann. (Purdon, 1931) tit. 12, § 1222; for the rule in equity itself, see Greenfield v. Blumenthal, 69 F. (2d) 294 (C. C. A. 3d, 1934)."

NOTE OF ADVISORY COMMITTEE TO RULE 17 (a): "The real party in interest provision, except for the last clause which is new, is taken verbatim from Equity Rule 37 (Parties Generally—Intervention), except that the word 'expressly' has been omitted. For similar provisions see N. Y. C. P. A. (1937) § 210; Wyo. Rev. Stat. Ann. (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U. S. C., Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, 'in the name of the United States for the use of the person suing'); and U. S. C.,

Title 25, § 201 (Penalties under laws relating to Indians—how recovered). Compare U. S. C., Title 26, § 1645 (c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States)."

NOTE OF ADVISORY COMMITTEE TO RULE 17 (c): "The provision for infants and incompetent persons is substantially Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. r. 16-21."

NOTE OF ADVISORY COMMITTEE TO RULE 18: "Note to Subdivision (a). 1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See Ill. Rev. Stat. (1937) ch. 110, § 168; N. J. Comp. Stat. (2 Cum. Supp. 1911-1924) tit. 163, § 287 as modified by N. J. Sup. Ct. Rules, Rule 21, 2 N. J. Misc. 1208 (1924); N. Y. C. P. A. (1937) § 258 as amended by Laws of 1935, ch. 339.

"2. This provision for joinder of actions has been patterned upon Equity Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 18, r. r. 1-9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See N. Y. C. P. A. § 258 before amended in 1935; compare Kan. Gen. Stat. Ann. (1935) § 60-601; Wis. Stat. (1935) § 263.04 for the more liberal practice.

"3. The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale L. J. 393, 397-410. For separate trials of joined claims, see Rule 42 (b).

"Note to Subdivision (b). This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent convey-

ances the rule changes the former rule requiring a prior judgment against the owner (Braun v. American Laundry Mach. Co., 56 F. (2d) 197 (S. D. N. Y., 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv. L. Rev. 404, 444 (1933)."

NOTE OF ADVISORY COMMITTEE TO RULE 19 (a): "The first sentence with verbal differences (e. g., 'united' interest for 'joint' interest) is to be found in Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp. Laws (1933) § 3392 (containing in same sentence a 'class suit' provision); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89-515 (immediately followed by 'class suit' provisions, § 89-516). See also Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, see Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 U. S. 459 (1926).

"The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected)."

NOTE OF ADVISORY COMMITTEE TO RULE 19 (b): "For the substance of this rule See Equity Rule 39 (Absence of Persons who Would be Proper Parties) and U. S. C., Title 28, § 111 (When part of several defendants can not be served); Camp v. Gress, 250 U. S. 308 (1919). See also the second and third sentences of Equity Rule 37 (Parties Generally—Intervention)."

NOTE OF ADVISORY COMMITTEE TO RULE 20: "The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

"With this rule compare also Equity Rules 26 (Joinder of Causes of Action), 37 (Parties Generally—Intervention), 40 (Nominal Parties), and 42 (Joint and Several Demands).

"The provisions of this rule for the joinder of parties are subject to Rule 82 (Jurisdiction and Venue Unaffected).

"Note to Subdivision (a). The first sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 1. Compare

Calif. Code Civ. Proc. (Deering, 1937) §§ 378, 379a; Ill. Rev. Stat. (1937) ch. 110, §§ 147-148; N. J. Comp. Stat., (2 Cum. Supp., 1911-1924) tit. 163, §§ 280, 282; N. Y. C. P. A. (1937) §§ 209, 211. The second sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 4. The third sentence is derived from O. 16, r. 5, and the fourth from O. 16, r. r. 1 and 4.

"Note to Subdivision (b). This is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. r. 1 and 5."

NOTE OF ADVISORY COMMITTEE TO RULE 23 (a): "This is a substantial restatement of Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L. J. 551, 570 et seq. (1937); Moore and Cohn, Federal Class Actions, 32 Ill. L. Rev. 307 (1937); Moore and Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill. L. Rev. 555-567 (1938); Lesar, Class Suits and the Federal Rules, 22 Minn. L. Rev. 34 (1937); cf. Arnold and James, Cases on Trials, Judgments and Appeals (1936) 175; and see Blume, Jurisdictional Amount in Representative Suits, 15 Minn. L. Rev. 501 (1931).

"The general test of Equity Rule 38 (Representatives of Class) that the question should be 'one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court,' is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in Equity Rule 38, see Del. Ch. Rule 113; Fla. Comp. Gen. Laws Ann. (Supp., 1936) § 4918 (7); Georgia Code (1933) § 37-1002, and see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala. Code Ann. (Michie, 1928) § 5701; 2 Ind. Stat. Ann. (Burns, 1933) § 2-220; N. Y. C. P. A. (1937) § 195; Wis. Stat. (1935) § 260.12.

These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v. Stiglitz*, 260 Ky. 430, 86 S. W. (2d) 155 (1935). The rule adopts the test of Equity Rule 38, but defines what constitutes a 'common or general interest.' Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, The 'Common Questions' Principle in the Code Provision for Representative Suits, 30 Mich. L. Rev. 878 (1932). For discussion of what constitutes 'numerous persons' see Wheaton, Representative Suits Involving Numerous Litigants, 19 Corn. L. Q. 399 (1934); Note, 36 Harv. L. Rev. 89 (1922).

"Clause (1). Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v. Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921); *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (NS) 1067 (1906); *Colt v. Hicks*, 97 Ind. App. 177, 179 N. E. 335 (1932). Compare Rule 17 (b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L. J. 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v. Swormstedt*, 16 How. 288 (U. S., 1853). Compare *Christopher, et al. v. Brusselback*, 58 S. Ct. 350 (1938).

"For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 (1921). See also *Terry v. Little*, 101 U. S. 216 (1880); *John A. Roebbling's Sons Co. v. Kinnicutt*, 248 Fed. 596 (D. C. N. Y., 1917) dealing with the right held in common by creditors to

enforce the statutory liability of stockholders.

"Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936); *Glenn, The Stockholder's Suit—Corporate and Individual Grievances*, 33 Yale L. J. 580 (1924); *McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L. J. 421 (1937). See also Subdivision (b) of this rule which deals with Shareholder's Action; Note, 15 Minn. L. Rev. 453 (1931).

"Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause.

An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

"Clause (3). See *Everglades Drainage League v. Napoleon Broward Drainage Dist.*, 253 Fed. 246 (D. C. Fla., 1918); *Gramling v. Maxwell*, 52 F. (2d) 256 (D. C. N. C., 1931), approved in 30 Mich. L. Rev. 624 (1932); *Skinner v. Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford v. Ellis* (1901) A. C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see *Blume, The 'Common Questions' Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878 (1932)."

NOTES TO DECISIONS

Adoption by Reference—Exhibits [Rule 10(c)].

An exhibit annexed to a complaint is a part thereof for all purposes and must be considered in determining the sufficiency of the pleading. *American Surety Co. v. Federal Reserve Bank (D. C.-Mo.)*, 29 Fed. Supp. 940.

In an action on a written instrument, if the averments of the complaint are completely negated by the instrument which is annexed as an exhibit, the latter prevails. *American Surety Co. v. Federal Reserve Bank (D. C.-Mo.)*, 29 Fed. Supp. 940.

Claims for relief should be separately stated so that each count shall be sufficient in itself, but allegations of one count may be incorporated by reference in another count. *Chappell & Co., Inc. v. Santangelo (D. C.-Conn.)*, 30 Fed. Supp. 599.

Caption; Names of Parties [Rule 10(a)].

The complaint must comply in form with the requirements of this rule as to the names of the parties. In *re Morris's Estate (D. C.-D. C.)*, 25 Fed. Supp. 454.

Claims for Relief [Rule 8(a)].

Form 9 in appendix to Rules of District Court approved. *Sierocinski v. E. I. Du Pont De Nemours & Co. (C. C. A. 3)*, 103 Fed. (2d) 843.

Plaintiff need not plead evidence, but "a short and plain statement of the claim showing that the pleader is entitled to

relief" is sufficient as a pleading and further information if needed to prepare a defense can be obtained by interrogatories. *Sierocinski v. E. I. Du Pont De Nemours & Co. (C. C. A. 3)*, 103 Fed. (2d) 843.

A complaint, in an action on a contract, which alleges the contract, performance by plaintiff, and failure to perform on the part of defendant, is good as against a motion to dismiss for insufficiency. *Sierocinski v. E. I. Du Pont De Nemours & Co. (C. C. A. 3)*, 103 Fed. (2d) 843; *Kraus v. General Motors Corp. (D. C.-N. Y.)*, 27 Fed. Supp. 537.

In an automobile accident case, an allegation in a complaint that defendant's car was being used with his knowledge and consent at the time of the accident is sufficient if the local law imposes liability on the owner under such circumstances. *D'Allessandro v. Bechtol (C. C. A. 5)*, 104 Fed. (2d) 845.

In a negligence action, a complaint which charges defendant with failure to take reasonable precaution to avoid the accident is sufficient to justify submitting the case to the jury on an issue of last clear chance. *Swift & Co. v. Young (C. C. A. 4)*, 107 Fed. (2d) 170.

The doctrine of last clear chance need not be pleaded by plaintiff if it is alleged that defendant's negligence is proximate cause of injury. *Swift & Co. v. Young (C. C. A. 4)*, 107 Fed. (2d) 170.

In an application for discharge from custody by a person committed for failure to obey a turnover order in bank-

ruptcy proceedings, a mere statement of present inability to comply with the order is more of a factual conclusion than an allegation of a fact and should be stricken for insufficiency. In *re Roxy Liquor Corp.* (C. C. A. 7), 107 Fed. (2d) 533.

The "short form" complaint in a copy-right suit was held sufficient and defendants' motion to dismiss on the grounds of (1) the failure to show derivation of plaintiff's ownership; (2) the absence of an averment as to originality and copyrightability; and (3) neglect to include in complaint a copy of the label, was denied. *Bobreck v. Denebeim* (D. C.-Mo.) 25 Fed. Supp. 208, 39 U. S. P. Q. 336.

An allegation in a complaint that "The plaintiff is an individual, and a citizen of the United States, and a citizen of the State of Ohio, and is domiciled in the State of Ohio" was considered a sufficient allegation of citizenship to support jurisdiction on the ground of diversity of citizenship. *Watters v. Ralston Coal Co.* (D. C.-Pa.), 25 Fed. Supp. 387.

Whether the plaintiff is entitled to the specific relief for which he asks will not be considered on a motion to dismiss the complaint for insufficiency. See Rule 54 (c). *Catanzaritti v. Bianco* (D. C.-Pa.), 25 Fed. Supp. 457.

Although plaintiff in an action sounding in tort may not be able to prove special damages pleaded by him, he may, nevertheless, recover for breach of the contract if he is shown by the evidence to be entitled to such recovery. *Nester v. Western Union Tel. Co.* (D. C.-Cal.), 25 Fed. Supp. 478.

The complaint in an action on an implied contract was dismissed as insufficient as not stating facts to support the conclusion of an implied promise to pay, and therefore as not containing a statement showing that the plaintiff was entitled to relief. *Washburn v. Moorman Mfg. Co.* (D. C.-Cal.), 25 Fed. Supp. 546.

The forms contained in the Appendix to Rules of District Court merely indicate the simplicity and brevity of statement which the rules contemplate, and the verbatim use of one of the forms of complaint does not obviate the requirement that a claim for relief shall contain a statement of the claim showing that the pleader is entitled to relief. See Rule 84. *Washburn v. Moorman Mfg. Co.* (D. C.-Cal.), 25 Fed. Supp. 546.

An amendment to a complaint in order to pray for alternative relief is not indispensable in view of Rule 54 (c) which provides for granting the relief to which a party is entitled even if he has not demanded it. *Borton v. Connecticut General Life Ins. Co.* (D. C.-Nebr.), 25 Fed. Supp. 579.

The plaintiff may, if he elects, ask for relief in the alternative. *Borton v. Connecticut General Life Ins. Co.* (D. C.-Nebr.), 25 Fed. Supp. 579; *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

Although a party may set forth two or more claims alternatively and hypothetically, and as many claims as he has regardless of consistency, and may demand relief in the alternative, he must, nevertheless, comply with the provisions of Rule 8 (a) (2). *Shell Petroleum Corp. v. Stueve* (D. C.-Minn.), 25 Fed. Supp. 879.

In a complaint for negligence, a mere general charge of negligence is sufficient without specification. *Hardin v. Interstate Motor Freight System, Inc.* (D. C.-Ohio), 26 Fed. Supp. 97.

If, under the facts alleged, the plaintiff is entitled to relief, a complaint will not be dismissed merely because the plaintiff requested relief to which he was not entitled. *Gay v. Moore* (D. C.-Okla.), 26 Fed. Supp. 749; *Securities & Exch. Comm. v. Timetrust, Inc.* (D. C.-Cal.), 28 Fed. Supp. 34.

In an action on a contract of employment, a complaint which states the date of the contract, the terms thereof, the amount of compensation to be paid, that the services to be rendered had been performed, and that there is money due under the contract, states facts sufficient to constitute a cause of action. *Neumann v. Faultless Clothing Co.* (D. C.-N. Y.), 27 Fed. Supp. 810.

In an action to enjoin violation of the Securities Act of 1933 (4 F. C. A., Title 15, §§ 77a to 77mm; U. S. C. A., Title 15, §§ 77a to 77mm; *id.* U. S. C.), a complaint charging violation of the act in the language of the statute, and alleging the details of the plan to defraud, is sufficient as a pleading. *Securities & Exch. Comm. v. Timetrust, Inc.* (D. C.-Cal.), 28 Fed. Supp. 34.

Allegations as to subsequent repair in a negligence action are evidentiary and should be stricken from the pleadings.

Satink v. Holland Tp. (D. C.-N. J.), 28 Fed. Supp. 67.

In an action by trustee in bankruptcy to set aside transfers of assets of the bankrupt to defendant as fraudulent and preferential, an allegation that the transfers were made while debtor was insolvent with intent to hinder, delay, and defraud creditors is a sufficient allegation of fraud. *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103.

Allegations in pleadings based on conclusions rather than facts are sufficient. *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103.

Averment that the amount in controversy is more than \$3,000 is an insufficient allegation of jurisdictional amount unless supported by other allegations of definite and concrete facts. *Moreschi v. Mosteller* (D. C.-Pa.), 28 Fed. Supp. 613; *Martin v. Moery* (D. C.-Ill.), 46 Bull. 4, 1 Fed. R. Dec. 130.

A formal allegation that the amount in controversy exceeds the sum of \$3,000 is a sufficient averment of jurisdictional amount unless the complaint contains other statements which contradict such allegation. *Heddons Sons v. Callender* (D. C.-Minn.), 28 Fed. Supp. 643; *Sun Oil Co. v. Pfeiffer* (D. C.-Okla.), 28 Bull. 3, 1 Fed. R. Dec. 119.

A pleading need allege only sufficient facts to apprise the opposing party of the nature of the claim. *Van Dyke v. Broadhurst* (D. C.-Pa.), 28 Fed. Supp. 737.

Even if the complaint contains no allegation of jurisdiction and the issue is not raised by defendant, the court of its own accord should nevertheless consider it. *Bender v. Connor* (D. C.-Conn.), 28 Fed. Supp. 903.

In an action for damages under the antitrust laws, a complaint failing to comply with new rules held insufficient, although filed prior to the effective date thereof. *Shurtz v. Foster & Kleiser Co.* (D. C.-Cal.), 29 Fed. Supp. 162.

An argumentative, verbose, and prolix pleading, containing evidentiary matter, is objectionable and may be stricken. *Chambers v. Cameron* (D. C.-Ill.), 29 Fed. Supp. 742.

Parties should be granted the relief to which they are entitled irrespective of the theory of their pleading. *Giesy v. American Nat. Bank* (D. C.-Ore.), 31 Fed. Supp. 524, superseding 52 Bull. 4.

A claim for relief stated in such a manner that it can not be determined whether it is for fraud, for breach of contract, or for conversion, should be dismissed with leave to amend. *Atwater v. North American Coal Corp.* (D. C.-N. Y.), 51 Bull. 1.

A motion to strike under Rule 12 (f) is not a proper method of raising the question of the sufficiency of a counterclaim or compliance with the rule requiring simplicity of pleading. This should be done by a motion to dismiss. *Myers v. Beckman* (D. C.-Okla.), 63 Bull. 5, 1 Fed. R. Dec. 99.

Commencement of Action [Rule 3].

Rule 3 relating to commencement of actions and Rule 4 (d) (4) relating to service upon the United States supplant the provisions of the Tucker Act, 8 F. C. A., Title 28, §§ 762, 763; U. S. C. A., Title 28, §§ 762, 763; *id.* U. S. C. United States ex rel. *Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

Filing of the complaint with the court tolls the statute of limitations irrespective of the fact that the period of limitation expired before service of summons and complaint on defendant. *Galagher v. Carroll* (D. C.-N. Y.), 27 Fed. Supp. 568.

Effect of Failure to Join [Rule 19(b)].

Where complete relief can be given as between plaintiffs and defendants, this rule does not require that other parties be joined in order that complete relief may be given between those persons and defendants. *Sauer v. Newhouse* (D. C.-N. J.), 24 Fed. Supp. 911.

If several of a number of joint tortfeasors are subject to the jurisdiction of the court, the action may proceed without joining other joint tortfeasors, as they are not indispensable parties. *Wyoga Gas & Oil Corp. v. Schrack* (D. C.-Pa.), 27 Fed. Supp. 35.

A Delaware corporation brought an action in the middle district of Pennsylvania against 26 former officers and directors of the corporation to recover damages for various acts of fraud, negligence, and misconduct, jurisdiction being based solely on diversity of citizenship. Twenty-four of the defendants were residents of the district in which suit was brought, some of whom moved to dismiss for improper venue on the

ground that some of the other defendants were nonresidents. Since liability of the defendants was joint and several, the nonresident defendants were not indispensable parties and therefore the motion should be denied. *Wyoga Gas & Oil Corp. v. Schrack* (D. C.-Pa.), 27 Fed. Supp. 35.

Majority stockholders, who make a contract for the benefit of the corporation, are not indispensable parties, although they may be necessary parties, to an action by a trustee in bankruptcy of the corporation, for breach of such contract. Failure to join them is not ground for dismissal. *Mahoney v. Bethlehem Engineering Corp.* (D. C.-N. Y.), 27 Fed. Supp. 865.

Plaintiff in a patent suit should be granted leave to join a joint infringer as an additional party defendant. *Deltex Rug Co. v. Colonial Coverlet Co., Inc.* (D. C.-Tenn.), 29 Fed. Supp. 122.

A person who is sought to be made an additional party defendant may appear and resist the motion. Such action does not constitute an entry of appearance in the action. *Deltex Rug Co. v. Colonial Coverlet Co., Inc.* (D. C.-Tenn.), 29 Fed. Supp. 122.

In an action for money judgment, a person who may be liable over to the defendant is not an indispensable party and failure to join such person is not ground for dismissal. *Texas & Pac. R. Co. v. Elgin, J. & Eastern R. Co.* (D. C.-Ill.), 59 Bull. 13, 1 Fed. R. Dec. 136.

In an action for declaratory judgment to determine the rights of the lessor under mineral leases, lessor's assignees of other rights in the leases are not indispensable parties and need not be joined if to do so would deprive the court of jurisdiction of the parties already before it. *Norton v. United Gas Corp.* (D. C.-La.), 64 Bull. 39, 1 Fed. R. Dec. 155.

In actions for declaratory relief, parties need not be joined merely because they have an interest in the subject-matter of the litigation. *Norton v. United Gas Corp.* (D. C.-La.), 64 Bull. 39, 1 Fed. R. Dec. 155.

Form of Action [Rule 2].

Motion to strike amended petition in equity seeking damages for diversion of petitioner's water-rights was properly entered where it had previously been de-

termined that one defendant had nothing to do with the waters in question after a certain date, and it was not alleged that other defendant had anything to do with them before that date, since the causes of action were several and not joint. *Nielson v. Utah Constr. Co.* (C. C. A. 9), 104 Fed. (2d) 887.

An action by a purchaser of securities on behalf of all persons similarly situated for damages resulting from fraud in the sale, alleging that the same misrepresentation was made to each purchaser, may be maintained as a spurious class action. *Independence Shares Corp. v. Deckert* (C. C. A. 3), 108 Fed. (2d) 51.

Although these rules abolished all distinctions in forms of actions, it may be necessary to ascertain the nature of the case presented for the purpose of determining which statute of limitation is applicable. *Williamson v. Columbia Gas & Elec. Corp.* (C. C. A. 3), 110 Fed. (2d) 15. See *El Paso v. West* (C. C. A. 5), 104 Fed. (2d) 96; *Williamson v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 198.

An action to recover triple damages under the antitrust laws is to be regarded as an action in trespass on the case for the purpose of determining what statute of limitations is applicable. *Williamson v. Columbia Gas & Elec. Corp.* (C. C. A. 3), 110 Fed. (2d) 15.

In the absence of a federal statute of limitations, the applicable state statute controls. *Williamson v. Columbia Gas & Elec. Corp.* (C. C. A. 3), 110 Fed. (2d) 15; *McGrath v. Helena Rubinstein, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 822; *Downey v. Palmer* (D. C.-N. Y.), 32 Fed. Supp. 344.

A suit is not subject to dismissal on the ground that it is in form a suit in equity whereas it should have been brought as an action at law, as now there is only one form of civil action. *Thermex Co. v. Lawson* (D. C.-Ill.), 25 Fed. Supp. 414.

The existence of an adequate remedy at law is not ground for dismissal of an action begun as a suit in equity before effective date of rules but which came on for hearing on a motion to dismiss after September 16, 1938. *Catanzaritti v. Bianco* (D. C.-Pa.), 25 Fed. Supp. 457; *Berger v. McHugh* (D. C.-Pa.), 26 Fed. Supp. 107; *Commonwealth Trust Co. v. Reconstruction Finance Corp.* (D. C.-Pa.), 28 Fed. Supp. 586.

If a complaint is too vague to enable the defendant to prepare his answer or to prepare for trial, he should not move to dismiss but should move for a more definite statement or a bill of particulars. See Rule 12 (e). *Berger v. McHugh* (D. C.-Pa.), 26 Fed. Supp. 107.

An action to recover treble damages for violation of antitrust laws is an action on the case and is governed by the state statute of limitations applicable to actions on the case. *Williamson v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 198.

In an action by creditors to enforce the double liability of bank stockholders, commenced prior to the effective date of the new rules, only the doctrine of laches rather than the state statute of limitations is applicable, since to apply the state statute of limitations would impose a different and probably shorter limitation on a pending cause than that existing when the action was commenced. *Partidge v. Ainley* (D. C.-N. Y.), 28 Fed. Supp. 472.

Only the procedural distinction between law and equity is abolished and not the distinction between legal and equitable remedies. A distinction must still be drawn between actions for legal relief and actions for equitable relief in order to determine whether a right to jury trial exists. *Bellavance v. Plastic-Craft Novelty Co.* (D. C.-Mass.), 30 Fed. Supp. 37.

The Conformity Act of 1872 has been superseded by the Act of June 19, 1934, 8 F. C. A., Title 28, §§ 723b, 723c, 724; U. S. C. A., Title 28, §§ 723b, 723c, 724; *id.* U. S. C. *Warren v. Indian-Ref. Co.* (D. C.-Ind.), 30 Fed. Supp. 281.

Infants or Incompetent Persons [Rule 17(c)].

A federal court may not appoint a guardian ad litem if an incompetent is represented by a committee or guardian appointed by a court of the state in which the federal court is held. *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co.* (D. C.-N. Y.), 27 Fed. Supp. 485.

Joinder of Claims [Rule 18(a)].

In the absence of diversity of citizenship, a claim for unfair competition may not be joined with a claim for infringement of a patent if the former claim charges competition with a product not

covered by the patent in suit. Dissenting opinion by Clark, J., distinguishes between claims for unfair competition which would entail proof different from that adduced in support of the infringement claim and claims which can be supported by the same proof. *Lewis v. Vendome Bags, Inc.* (C. C. A. 2), 108 Fed. (2d) 16.

In cases not based on diversity of citizenship, a claim not involving a federal question may not be joined with a claim based on the constitution or statutes of the United States and necessitating different proof. *Lewis v. Vendome Bags, Inc.* (C. C. A. 2), 108 Fed. (2d) 16.

Complaint alleged in the first cause of action an infringement of a copyrighted radio program, in the second cause a conspiracy to prevent plaintiff from producing the program, and in the third cause one of the defendants was charged with having induced two other defendants to breach their contract with plaintiff. The second and third causes of action as to which there was separately a lack of jurisdiction were not so inseparably connected with the infringement cause as to constitute proper joinder of claims, and motions to dismiss them for lack of jurisdiction were granted. *White v. Reach* (D. C.-N. Y.), 26 Fed. Supp. 77.

When causes of action are improperly joined, the remedy is not by motion to dismiss but by permitting the claims to be severed and proceeded with separately. *Federal Housing Administrator v. Christianson* (D. C.-Conn.), 26 Fed. Supp. 419.

A claim on a promissory note against three defendants may not be joined with a claim on another promissory note against two of the defendants, as they do not present a common question of law or fact. *Federal Housing Administrator v. Christianson* (D. C.-Conn.), 26 Fed. Supp. 419.

When an equitable demand for cancellation of a certificate of dissolution is joined with a claim of damages, the equitable issue should be disposed of first, after which, the trial of the legal issues may proceed, if necessary. *Frissell v. Rateau Drug Store, Inc.* (D. C.-La.), 28 Fed. Supp. 816.

A claim against one defendant charging unfair competition in advertising an alleged infringing device may not be joined with a claim against a different defendant for patent infringement in

selling the infringing device. *Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co.* (D. C.-Mass.), 29 Fed. Supp. 480.

Federal jurisdiction having attached in an action for trade-mark infringement and unfair competition between citizens of the same state, it will be retained for disposition of the unfair competition claim although the claim for trade-mark infringement is dismissed. *Corning Glass Works v. Pasmantier* (D. C.-N. Y.), 30 Fed. Supp. 477.

A claim in contract for breach of an undertaking safely to convey another by common carrier and a claim in tort for assault by agents of the carrier may properly be joined in one action. *Munzer v. Swedish American Line* (D. C.-N. Y.), 30 Fed. Supp. 789.

In the absence of diversity of citizenship, a claim for fraud may not be joined with one for patent infringement if the former does not rest upon the same facts as the latter. *Engler v. General Elec. Co.* (D. C.-N. Y.), 32 Fed. Supp. 913.

In the absence of diversity of citizenship, a claim for fraud may not be joined with one for patent infringement if the former does not rest upon the same facts as the latter. *Engler v. General Elec. Co.* (D. C.-N. Y.), 32 Fed. Supp. 913.

A claim for money damages may be joined with a claim for injunctive relief in an action under the antitrust laws. Defendant is entitled to a jury trial on the question of damages. *Columbia River Packers Assn., Inc. v. Hinton* (D. C.-Ore.), 40 Bull. 21.

Joinder of Remedies; Fraudulent Conveyances [Rule 18(b)].

An action on a fidelity bond will lie without waiting for an accounting to determine the amount for which principal is liable, in view of the rule which permits the joinder of such claims in the same action. *Utesch v. United States Fidelity & Guaranty Co.* (D. C.-Iowa), 27 Fed. Supp. 933.

A claim to adjudicate plaintiff's status as a stockholder may be joined in the same action with a claim to enforce a secondary right on behalf of the corporation. *Richardson v. Blue Grass Min. Co.* (D. C.-Ky.), 29 Fed. Supp. 658.

A preliminary injunction may be granted, during the pendency of an action and before the claim is reduced to judgment, to restrain defendants from

disposing of their property. *Reconstruction Finance Corp. v. Central Republic Trust Co.* (D. C.-Ill.), 30 Fed. Supp. 933.

An action to set aside a fraudulent conveyance may be brought by a person who has not reduced his claim to judgment. *Dubia v. Ebeling* (D. C.-Ill.), 30 Fed. Supp. 992.

Rule 18 (b) is construed to apply only to cases where there are at least two distinct claims or causes of action and not to a case which involves only one cause of action which may give rise to legal or equitable relief or both. *Lee v. Matheny* (D. C.-D. C.), 31 Fed. Supp. 246.

While a claim for damages for breach of contract may be joined with a claim to set aside a fraudulent conveyance, the new rules have not diminished the allegations necessary to support the latter claim for relief. *Iroquois Oil & Gas Co. v. Hollingsworth* (D. C.-Ill.), 21 Bull. 19, 1 Fed. R. Dec. 201.

In an action for money judgment, a debtor of the defendant may not be joined as an additional defendant for the purpose of enjoining him from paying over the money to the first defendant without compliance with the requirements relating to an attachment, since such a proceeding is in effect an application for an attachment. *Cheney Co. v. Branson* (D. C.-D. C.), 59 Bull. 12.

Necessary Joinder [Rule 19(a)].

In a patent suit commenced before the effective date of the new rules, a motion to dismiss on the ground that the patentee who is an involuntary party was joined as party plaintiff instead of as party defendant should be decided in accordance with the Equity Rules and denied, although the new rules would require the same decision on such a motion. *Hawkinson v. Carnell* (D. C.-Pa.), 26 Fed. Supp. 150, 40 U. S. P. Q. 66.

In an employee's action for personal injuries, the insurance company which carried the defendant employer's compensation insurance and was liable to pay compensation to plaintiff was brought in as an additional party on the court's own motion. It should be joined as an involuntary plaintiff rather than as a defendant. *Slauson v. Standard Oil Co.* (D. C.-Wis.), 29 Fed. Supp. 497.

A joint owner of a patent right may not join his co-owner as a party defendant in an action for infringement nor may he compel such co-owner to join as

a party plaintiff. The owner of a part interest in a patent may not maintain an infringement suit, if the other joint owner fails to join. *Gibbs v. Emerson Elec. Mfg. Co.* (D. C.-Mo.), 29 Fed. Supp. 810.

Defendants' motion to dismiss should be granted in an action in which an indispensable party has been granted permission to intervene as a party plaintiff but failed to file a pleading. *Paasche v. Atlas Powder Co.* (D. C.-Ill.), 31 Fed. Supp. 31.

Paragraphs; Separate Statements [Rule 10(b)].

In a joint action by two apparently unrelated holders of corporate bonds against the guarantor of such bonds, plaintiffs should be required to state in separate counts the alleged causes of action, in view of the fact that one or more affirmative defenses may appear appropriate in answer to one plaintiff but not to the other. See Rule 8(e). *Bicknell v. Lloyd-Smith* (D. C.-N. Y.), 25 Fed. Supp. 657.

On motion for order to require plaintiff to number paragraphs of his claim and to state separately and number his causes of action, the first part of the motion was granted, but since there was only one cause of action stated, the second part was denied. *Schoenberg v. Decorative Cabinet Corp.* (D. C.-N. Y.), 27 Fed. Supp. 802.

A claim for trade-mark infringement should be stated separately from a claim for unfair competition, although failure to state claims separately is not a ground for dismissal. *Ford Motor Co. v. McFarland* (D. C.-Wash.), 29 Fed. Supp. 303.

Multiple plaintiffs should not be required to state their individual claims separately if there is a unity of interest as to all. *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. Y.), 30 Fed. Supp. 389.

In a stockholder's derivative action, claims against defendants, some of whom are directors of one corporation and some of whom are trustees in bankruptcy and reorganization proceedings of another corporation, should be separately stated and numbered. *Jablow v. Agnew* (D. C.-N. Y.), 30 Fed. Supp. 718.

Although Rule 8 and this rule require that statements of a claim, founded upon separate transactions or occurrences,

must be divided into separate counts, a complaint which sets forth statements of different methods wherein it is claimed that a copyright was infringed is not required to be separated. *Cowen v. Braun* (D. C.-Iowa), 2 Bull. 9, 1 Fed. R. Dec. 43.

In an action which was commenced before the effective date of the new rules and in which an amended complaint was dismissed after such date for lack of jurisdiction, plaintiff's leave to serve a second amended complaint may be conditioned on compliance with the new rules in respect of separately stating and numbering the causes of action. *American Fomon Co. v. United Dyewood Corp.* (D. C.-N. Y.), 24 Bull. 1, 1 Fed. R. Dec. 171.

The claims of plaintiff as an individual and as administratrix of an estate should be set out in separate counts. *Dellefield v. Blockdel Realty Co., Inc.* (D. C.-N. Y.), 59 Bull. 7, 1 Fed. R. Dec. 42.

Permissive Joinder [Rule 20(a)].

A claim on a promissory note against three defendants may not be joined with a claim on another promissory note against two of the defendants, as they do not present a common question of law or fact. *Federal Housing Administrator v. Christianson* (D. C.-Conn.), 26 Fed. Supp. 419.

In an action for patent infringement, a corporation operated by the original defendant and alleged to be infringing the same patents, may be brought in by the plaintiff as an additional defendant. *Boysell Co. v. Franco* (D. C.-Ga.), 26 Fed. Supp. 421.

Parties may be joined as defendants against whom the right to relief exists in the alternative. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

Claims for damages against several of a number of joint tort-feasors may be joined in one action and a separate trial may be had on the claims against some of them. *Wyoga Gas & Oil Corp. v. Schrack* (D. C.-Pa.), 27 Fed. Supp. 35.

A collector of taxes for three political subdivisions gave a single fidelity bond. The state law imposed on each political subdivision a liability for its proportionate share of the bond premium. The surety could join these three parties as defendants in an action to recover the premium even though a separate judgment would be rendered against each for

one-third of the premium. *National Surety Corp. v. Allentown* (D. C.-Pa.), 27 Fed. Supp. 515.

Plaintiff may maintain suit on like claims against several defendants in one action although such action was commenced before the effective date of the rules. *National Surety Corp. v. Allentown* (D. C.-Pa.), 27 Fed. Supp. 515.

This rule specifically upholds the right of a bonding company to have determined in one action separate claims against the several obligees under the bond. *National Surety Corp. v. Allentown* (D. C.-Pa.), 27 Fed. Supp. 515.

In an action to recover for personal injuries sustained while unloading a freight car, plaintiff may join as parties defendant the resident delivering carrier and the nonresident initial carrier, if both of them were responsible for the accident. A motion to remand to the state court, after the latter had removed the case on the grounds of a separable controversy as to it, should be granted. *Whitley v. Missouri Pac. R. Co.* (D. C.-La.), 27 Fed. Supp. 919.

In a proceeding to restrain violation of a statute, persons charged with aiding and abetting such violation may be joined as defendants. *Securities & Exch. Comm. v. Timetrust, Inc.* (D. C.-Cal.), 28 Fed. Supp. 34.

Neither misjoinder of parties plaintiff nor misjoinder of parties defendant is a ground for dismissal. *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103; *Holmberg v. Hannaford* (D. C.-Ohio), 28 Fed. Supp. 216.

Parties defendant may be joined only if the right to relief against them arises out of the same transaction or series of transactions, and if there exists a common question of law or fact. *Alabama Independent Service Station Assn., Inc. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386.

In a suit to enjoin, and recover damages for violations of the antitrust laws by oil companies supplying gasoline to tire companies at an unjustified price differential, operators of gasoline service stations were properly joined as plaintiffs. *Alabama Independent Service Station Assn., Inc. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386.

A claim against one defendant charging unfair competition in advertising an alleged infringing device may not be joined with a claim against a different defendant for patent infringement in

selling the infringing device. *Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co.* (D. C.-Mass.), 29 Fed. Supp. 480.

Joinder of nonresidents who can not be served with process as parties defendant does not deprive the court of jurisdiction, if such nonresidents are not indispensable parties. *Wyoga Gas & Oil Corp. v. Schrack* (D. C.-Pa.), 29 Fed. Supp. 582.

Joinder of parties defendant is permissible if such joinder results in no substantial prejudice to a defendant and if delay, expense, and inconvenience to witnesses will be lessened by such joinder. *McNally v. Simons* (D. C.-N. Y.), 29 Fed. Supp. 926.

In an action involving title to land, all persons claiming interest as grantees may be joined as parties since their presence is necessary for a final disposition of all questions of title, if such joinder does not deprive the court of jurisdiction of the action. *Carter Oil Co. v. Wood* (D. C.-Ill.), 30 Fed. Supp. 875.

In an action involving title to land, all persons claiming interest as grantees may be joined as parties since their presence is necessary for a final disposition of all questions of title, if such joinder does not deprive the court of jurisdiction of the action. *Carter Oil Co. v. Wood* (D. C.-Ill.), 30 Fed. Supp. 875.

An insurance company suing an annuitant for a declaratory judgment to determine its right to retain premiums paid for the annuity may join an alleged heir of the annuitant who has challenged the validity of the annuity contract, as a party defendant. *Mutual Life Ins. Co. v. Benton* (D. C.-Mo.), 64 Bull. 42, 1 Fed. R. Dec. 151.

The rules relating to joinder of parties apply to suits for declaratory judgments. *Mutual Life Ins. Co. v. Benton* (D. C.-Mo.), 64 Bull. 42, 1 Fed. R. Dec. 151.

Pleadings [Rule 7(a)].

A bill in equity for an injunction filed after the effective date of the Federal Rules of Civil Procedure will be considered a complaint in a civil action. *Fried v. Warner Bros. Circuit Management Corp.* (D. C.-Pa.), 26 Fed. Supp. 603.

A reply to an answer which does not contain a counterclaim and a rejoinder are improper and should be treated as superfluous. *Bender v. Connor* (D. C.-Conn.), 28 Fed. Supp. 903.

Admissions contained in a reply may be considered on a motion for judgment on the pleadings, even though the service of a reply was not authorized. *United States Trust Co. v. Sears* (D. C.-Conn.), 29 Fed. Supp. 643.

No reply is required except to a counterclaim or when ordered by the court. Hence, plaintiff need not deny allegations contained in the answer and the defendant's motion for judgment on the pleadings on the ground of insufficient denial of allegations of the answer should be denied. *Central Trust Co. v. Second Nat. Bank* (D. C.-Pa.), 19 Bull. 1, 1 Fed. R. Dec. 98.

There is no authority to file an answer to a reply to a counterclaim without leave of court. *Coley v. Pierce* (D. C.-D. C.), 56 Bull. 1, 1 Fed. R. Dec. 77.

Pleading to be Concise and Direct; Consistency [Rule 8(a)].

A pleading which contains many evidentiary allegations and inconsistent allegations not properly separated does not meet the requirement that pleadings shall be simple, concise, and direct, and should be stricken off. *Catanzaritti v. Bianco* (D. C.-Pa.), 25 Fed. Supp. 457.

Claim in the nature of ejectment and a claim to impress a trust may be joined alternatively in spite of the fact that they may be inconsistent. *Catanzaritti v. Bianco* (D. C.-Pa.), 25 Fed. Supp. 457.

The fact that a counterclaim and a third-party claim interposed by the same defendant are inconsistent with each other is no objection to bringing in the third-party defendant. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

Under civil procedure rules counts in tort based on copyright statute may be joined with count in contract. *Michelson v. Shell Union Oil Corp.* (D. C.-Mass.), 26 Fed. Supp. 594, 40 U. S. P. Q. 409.

A party may state his case as extensively as he wishes and is not confined to one theory. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

In an action for declaratory relief adjudging that plaintiff did not infringe defendant's patent, a motion by the latter to strike from the complaint allegations of unsuccessful attempts to intimidate plaintiff and attempts surreptitiously to obtain an assignment of an application

for patent upon plaintiff's device should be granted as failing to comply with the requirements of simple, concise, and direct pleading. *Watts Elec. & Mfg. Co. v. United-Carr Fastener Corp.* (D. C.-Mass.), 27 Fed. Supp. 277.

The complaint in an action on a contract for exclusive use of a patent may join a claim for failure to pay royalties and a claim for failure to use plaintiff's alleged patent, even if they are inconsistent. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

The complaint may contain inconsistent claims in the alternative and plaintiff should not be required to elect upon which theory he intends to rely. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

The allegation of prior notice in a negligence action which incorporates by reference a letter to defendant from a third person informing as to the need of repair is to that extent not a simple, concise, and direct statement and should be stricken. *Satink v. Holland Tp.* (D. C.-N. J.), 28 Fed. Supp. 67.

Objections to the complaint on the ground that it does not conform to this rule should be presented by motion to strike the objectionable provisions rather than by a motion to strike the entire complaint. *Shultz v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 29 Fed. Supp. 37.

A disjunctive allegation in the complaint, pleading common-law and statutory liability, is not objectionable. *Loughman v. Pitz* (D. C.-N. Y.), 29 Fed. Supp. 882.

A claim for relief need not indicate the legal theory upon which the pleader predicates his rights. *Giesy v. American Nat. Bank* (D. C.-Ore.), 52 Bull. 4, superseded by 31 Fed. Supp. 524.

A pleading which contains evidentiary and unnecessary matter and which is not simple, concise, and direct should be revised to comply with the rules. *Dellefield v. Blockdel Realty Co., Inc.* (D. C.-N. Y.), 59 Bull. 5, 1 Fed. R. Dec. 42.

A stockholder's derivative action should be clearly alleged as such. *Dellefield v. Blockdel Realty Co., Inc.* (D. C.-N. Y.), 59 Bull. 5, 1 Fed. R. Dec. 42.

Real Party in Interest [Rule 17 (a)].

In an action in which there is a nominal plaintiff and a "use" plaintiff, the residence of the former is determinative

of the question whether the requisite diversity of citizenship exists for jurisdictional purposes. *Moore v. Schwartz* (D. C.-Pa.), 26 Fed. Supp. 188.

The requirement that every action shall be prosecuted in the name of the real party in interest does not necessarily preclude the bringing of an action by one party "to the use" of another, in cases in which actions were heretofore brought in that manner. *Moore v. Schwartz* (D. C.-Pa.), 26 Fed. Supp. 188.

A trade association is not the real party in interest with capacity to prosecute an action to enforce the separate property rights of its individual members. *Alabama Independent Service Station Assn., Inc. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386.

Members of a trade association may sue on behalf of the other members of the association who are similarly situated. *Alabama Independent Service Station Assn., Inc. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386.

In an action for declaratory relief against liability under an automobile insurance policy, plaintiff insurance company which executed and delivered the policy as attorney in fact for the issuing company is the real party in interest, since it is a trustee of an express trust and also a party in whose name a contract has been made for the benefit of another. *Farmers Underwriters Assn. v. Wanner* (D. C.-Idaho), 30 Fed. Supp. 358.

Representation [Rule 23 (a)].

An action by a purchaser of securities on behalf of all persons similarly situated for damages resulting from fraud in the sale, alleging that the same misrepresentation was made to each purchaser, may be maintained as a spurious class action. *Independence Shares Corp. v. Deckert* (C. C. A. 3), 108 Fed. (2d) 51.

In a class action, the relation of the parties must be such that the representative and the represented properly could be joined as coplaintiffs, if it were practicable to do so. *Buck v. Russo* (D.

C.-Mass.), 25 Fed. Supp. 317, 39 U. S. P. Q. 377.

Members of a trade association may sue on behalf of the other members of the association who are similarly situated. *Alabama Independent Service Station Assn., Inc. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386.

A former member of a group of employees insured under a group insurance policy was not sufficiently representative of the group to entitle him to bring a class action against the employer to recover surplus funds paid to the latter which under the terms of the policy were to be applied to the payment of the subsequent premiums. *Peelias v. Caterpillar Tractor Co.* (D. C.-Ill.), 30 Fed. Supp. 173.

Separate Trials [Rule 20 (b)].

Claims for damages against several of a number of joint tort-feasors may be joined in one action and a separate trial may be had on the claims against some of them. *Wyoga Gas & Oil Corp. v. Schrack* (D. C.-Pa.), 27 Fed. Supp. 35.

Separate trials in an action should not be granted unless it appears that to do so will prevent delay or prejudice. Several demands arising from the same occurrence should be tried together as multiplicity of separate trials would frustrate liberal provisions of the rules. *Chappell & Co., Inc. v. Santangelo* (D. C.-Conn.), 30 Fed. Supp. 599.

Signing of Pleadings [Rule 11].

The requirements of this rule and Rule 7 are met by a motion made by a firm of attorneys and signature by one signing himself as a member of the firm, although his name is not included in the firm name. *United States v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 225.

If a pleading is filed without signature by at least one attorney of record in his individual name, leave to comply with the rule may be granted subsequently by the court. *De Montis v. Potomac Elec. Power Co.* (D. C.-D. C.), 61 Bull. 3, 1 Fed. R. Dec. 119.

SECTION 2

ALLEGATIONS OF JURISDICTION

Form

A. Diversity of citizenship and amount in controversy.

- 59. One individual against one individual.
- 60. One individual against a corporation.
- 61. One individual against two individuals who are citizens of the same state.
- 62. One individual against two individuals who are citizens of different states.
- 63. Two individuals who are citizens of the same state against two individuals who are both citizens of another state.
- 64. Two individuals who are citizens of different states against two individuals who are citizens of the same state.
- 65. One individual against a partnership.

Form

- 66. A partnership against a corporation.
- 67. A citizen against an alien individual.
- 68. An alien corporation against a citizen.

B. Federal question and amount in controversy.

- 69. Under the Constitution of United States.
- 70. Under a law of the United States.
- 71. Under a law of the United States not requiring jurisdictional amount.
- 72. Under a treaty of the United States.

C. Action by the United States.

- 73. United States suing in own name.
- 74. Action by an officer of the United States authorized by law to sue.

D. Action against the United States.

- 75. Proceeding under the Tucker Act.

INTRODUCTION.—Capacity to sue to the extent required to show the jurisdiction of the court must be alleged but the facts showing the existence of the capacity to sue need not be set out in detail. It has been held that an allegation that "The amount involved in this controversy, exclusive of interest and costs, is in excess of \$3,000" suffices to show the existence of the requisite jurisdictional amount. *James Heddon's Sons v. Callender* (D. C.-Minn.), 28 Fed. Supp. 643; *Sun Oil Co. v. Pfeiffer* (D. C.-Okla.), 28 Bull. 3, 1 Fed. R. Dec. 119. Even prior to the adoption of the new Rules, a general allegation of the existence of the jurisdictional amount was regarded as sufficient unless contradictory facts appeared on the face of the pleading. *KVOS v. Associated Press*, 299 U. S. 269, 277, 81 L. ed. 183, 57 Sup. Ct. 197; *E. I. Du Pont DeNemours & Co. v. Temple* (C. C. A. 4), 272 Fed. 456; *General Petroleum Corp. v. Beanblossom* (C. C. A. 9), 47 Fed. (2d) 826.

A. DIVERSITY OF CITIZENSHIP AND AMOUNT IN CONTROVERSY**59. One Individual Against One Individual.**

(Caption.)

1. Plaintiff is a citizen of the state of Nebraska and defendant is a citizen of the state of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

Cross-Reference.

In connection with this section, see Rule 8 (a) as set out under Form 56, also notes concerning pleadings, Form 56.

Statutory References.

If the plaintiff is an assignee of a promissory note or other chose in action, except bearer paper not made by a corporation, he should allege facts showing diversity of citizenship as between original assignor and the defendant, 7 F. C. A., Title 28, § 41 (1); U. S. C. A., Title 28, § 41 (1); id. U. S. C.

United States District Courts have original jurisdiction of all civil actions,

where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and is between citizens of different States, 7 F. C. A., Title 28, § 41 (1); U. S. C. A., Title 28, § 41 (1); id. U. S. C.

Federal Rules of Civil Procedure.

NOTE OF ADVISORY COMMITTEE TO FORM 2 OF APPENDIX TO FORMS: "Since improper venue is an affirmative dilatory defense [under Rule 12 (b) (3)], it is not necessary for plaintiff to include allegations showing venue to be proper."

NOTES TO DECISIONS**Allegations of Jurisdictional Amount.**

The allegation as to jurisdictional amount is general in character, as suggested by the Advisory Committee. Allegations so made were sanctioned prior to the adoption of the new rules in *KVOS v. Associated Press*, 299 U. S. 269, 81 L. ed. 183, 57 Sup. Ct. 197; *E. I. DuPont DeNemours & Co. v. Temple* (C. C. A. 4), 272 Fed. 456; *General*

Petroleum Corp. v. Beanblossom (C. C. A. 9), 47 Fed. (2d) 826. It was held in the Eastern District of Illinois, on September 23, 1939, in *Martin v. Moery*, 46 Bull. 4, 1 Fed. R. Dec. 130, that such a general allegation is insufficient if detailed averments in the complaint show that less than the jurisdictional amount is involved.

60. One Individual Against a Corporation.

(Caption.)

1. Plaintiff is a citizen of the state of Ohio and defendant is a corporation incorporated under the laws of the state of New Jersey. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

61. One Individual Against Two Individuals Who are Citizens of the Same State.

(Caption.)

1. Plaintiff is a citizen of the state of Kansas and each defendant is a citizen of the state of Missouri. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

62. One Individual Against Two Individuals Who are Citizens of Different States.

(Caption.)

1. Plaintiff is a citizen of the state of Iowa. Defendant, AB, is a citizen of the state of North Dakota, and defendant, CD, is a citizen of

the state of Minnesota. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

63. Two Individuals Who are Citizens of the Same State Against Two Individuals Who are Both Citizens of Another State.

(Caption.)

1. Each plaintiff is a citizen of the state of Michigan and each defendant is a citizen of the state of Kentucky. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

64. Two Individuals Who are Citizens of Different States Against Two Individuals Who are Citizens of the Same State.

(Caption.)

1. Plaintiff AB is a citizen of the state of California, and plaintiff CD is a citizen of the state of Nevada. Defendant EF and defendant GH are each citizens of the state of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

65. One Individual Against a Partnership.

(Caption.)

1. Plaintiff is a citizen of the state of New Mexico. Defendant is a partnership consisting of AB, who is a citizen of the state of Utah and CD, who is a citizen of the state of Nevada. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

66. A Partnership Against a Corporation.

(Caption.)

1. Plaintiff is a partnership consisting of AB, CD, and EF, each of whom is a citizen of the state of Arkansas. Defendant is a corporation incorporated under the laws of the state of Oklahoma. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

67. A Citizen Against an Alien Individual.

(Caption.)

1. Plaintiff is a citizen of the state of Maine and defendant is a (subject of the Emperor (King) (Queen) of —) (citizen of the Republic of —).

The amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

68. An Alien Corporation Against a Citizen.

(Caption.)

1. Plaintiff is a corporation incorporated under the laws of the Kingdom (Republic) of — and defendant is a citizen of the state of Montana. The amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

B. FEDERAL QUESTION AND AMOUNT IN CONTROVERSY

69. Under the Constitution of United States.

(Caption.)

1. The action arises under (the Constitution of the United States, Article —, section —) (the — Amendment to the Constitution of the United States, section —,) as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

70. Under a Law of the United States.

(Caption.)

1. The action arises under the Act of — —, 19—, — Stat. — (U. S. C., Title —, section —), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

71. Under a Law of the United States Not Requiring Jurisdictional Amount.

(Caption.)

1. The action arises under the Act of — —, 19—, — Stat. — (U. S. C., Title —, section —), as hereinafter more fully appears.

Statutory Reference.

“* * * The foregoing provision as to the sum or value of the matter in controversy shall not be construed to

apply to any of the cases mentioned in the succeeding paragraphs of this section.” 7 F. C. A., Title 28, § 41 (1); U. S. C. A., Title 28, § 41 (1); id. U. S. C.

72. Under a Treaty of the United States.

(Caption.)

1. The action arises under the treaty of the United States with [here describe the treaty], as hereinafter more fully appears. The matter in

controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

C. ACTION BY THE UNITED STATES

73. United States Suing in Own Name.

(Caption.)

1. Plaintiff is the United States of America.

74. Action by an Officer of the United States Authorized by Law to Sue.

(Caption.)

1. Plaintiff is the [title of officer], an officer of the United States authorized to sue by the Act of ———, 19——, ——— Stat. ——— (U. S. C., Title ———, section ———).

D. ACTION AGAINST THE UNITED STATES

75. Proceeding under the Tucker Act.

(Caption.)

1. The action is brought under paragraph 20 of section 24 of the Act of March 3, 1911, 36 Stat. 1093, as amended (U. S. C., Title 28, section 41 (20) and is founded upon an express contract with the United States. The amount in controversy does not exceed ten thousand dollars (\$10,000).

Cross-Reference.

Suits against United States in court of claims, Forms 900-908.

Title 28, § 41 (20); U. S. C. A., Title 28, § 41 (20); id. U. S. C.; 8 F. C. A., Title 28, §§ 761 to 766; U. S. C. A., Title 28, §§ 761 to 766; id. U. S. C.

Statutory Reference.

Suits against United States, 7 F. C. A.,

SECTION 3

CLAIMS FOR RELIEF

Form

78. Complaint on a promissory note.
79. Complaint on an account.
80. Complaint for goods sold and delivered.
81. Complaint for money lent.

Form

82. Complaint for money paid by mistake.
83. Complaint for money had and received.
84. Complaint for breach of contract.
85. Complaint for negligence.

86. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C. D. or E. F. or whether both are responsible and where his evidence may justify a finding of wilfulness or of recklessness or of negligence.
87. Complaint for conversion.
88. Complaint for specific performance of contract to convey land.
89. Complaint on claim for debt and to set aside fraudulent conveyance under Rule 18 (b).
90. Complaint for negligence under federal employer's liability act.
91. Complaint for damages under merchant marine act.
92. Complaint for infringement of patent.
93. Complaint for infringement of copyright and unfair competition.
94. Complaint for interpleader and declaratory relief.
95. Complaint for declaratory judgment.
96. Complaint under the Tucker Act for breach of contract.
97. Complaint to foreclose a mortgage in jurisdiction in which a mortgage is a conveyance.
98. Complaint to foreclose a mortgage in jurisdiction in which a mortgage is a lien.
99. Complaint to restrain violations of a negative covenant.
100. Complaint by subcontractor for labor and material under the Heard Act.
101. Complaint by trustee in bankruptcy to set aside fraudulent conveyance.
102. Complaint for negligent manufacture and distribution of a dynamite cap.
103. Complaint for unfair competition.
104. Complaint against owner of car for injuries negligently inflicted.
105. Complaint in stockholders' representative suit in behalf of corporation.
106. Complaint to annul a contract for fraud.
107. Complaint for rescission of a contract on the ground of mistake.
108. Complaint by United States for collection of taxes.
109. Complaint against collector for refund of taxes illegally collected.
110. Complaint against the United States on a contract of government life insurance.
111. Complaint to cancel certificate of citizenship for establishing permanent residence abroad.
112. Complaint for cancellation of certificate of citizenship for fraud in its procurement.
113. Payee against maker of a promissory note.
114. Negligent driving.
115. Lord Campbell's Act.
116. Injunction and damages for infringement of patent.
117. For rent.

INTRODUCTION.—This section contains forms of claims for relief in a variety of cases. It might not be out of place to give special mention to one or two of the causes of action for which forms are given. With reference to negligence, there has been considerable discussion as to what constitutes a sufficient allegation thereof. Official Form 9 sets out a complaint in an action for negligence embracing an allegation that on a specified date and at a particular place "The defendant negligently drove a motor vehicle against plaintiff, who was then crossing said highway." It will be noted that this form contains no specification as to the nature of the negligence. The sufficiency of this form has been sustained, and it has been held that a general charge of negligence without specification is sufficient. *Sierocinski v. E. I. Du Pont De Nemours & Co.* (C. C. A. 3), 103 Fed. (2d) 843; *Hardin v. Interstate Motor Freight System, Inc.* (D. C. Ohio), 26 Fed. Supp. 97.

In the case first cited, an action was brought to recover damages for personal injuries caused by the premature explosion of a dynamite cap. It was alleged that the defendant negligently manufactured the cap "in such a fashion that it was unable to withstand the crimping which defendant knew it would be subjected to" and distributed the cap so constructed that it would be exploded upon being crimped. The sufficiency of the complaint was sustained by the Circuit Court of Appeals. It seems, therefore, that under the new procedure a general averment of negligence is sufficient without a specification of a negligent act or omission to act. It is not out of place to observe that at common law a declaration in an action on the case based on negligence was sufficient if the pleader confined himself to a general averment of negligence without any specification.

Whether or not the plaintiff in an action based on negligence is required to allege freedom from contributory negligence, in a case governed by the law of a state imposing such a requirement, is a question which has not been definitely determined by the higher courts, although District Court decisions indicate that such an averment is necessary. *Francis v. Humphrey* (D. C. Ill.), 25 Fed. Supp. 1.

It is pointed out in that case that Rule 8 (c) means merely that whenever contributory negligence is involved as a defense, it must be pleaded affirmatively and may not be raised by general denial. Some authorities take the view that the question is one of procedure rather than of substantive law and that, as a result, the rules govern and the law of the particular state need not be followed. Under these cases the defendant would be required to plead contributory negligence irrespective of the state rule.

Fraud or mistake and the circumstances constituting the same must, under Rule 9 (b) be stated with particularity. On the other hand, malice, intent, or other conditions of mind may be averred generally. *E. I. Du Pont De Nemours & Co. v. DuPont Textile Mills, Inc.* (D. C.-Pa.), 26 Fed. Supp. 236; *Love v. Commercial Casualty Ins. Co.* (D. C.-Miss.), 26 Fed. Supp. 481.

As to what constitutes a sufficient specification of fraud or mistake, it appears to be somewhat uncertain. It was held in the southern district of New York in the case of *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103, that in an action by a trustee in bankruptcy to set aside fraudulent and preferential transfers it was sufficient to allege that the transfers were made by the debtors while he was insolvent with intent to hinder, delay and defraud his creditors.

78. Complaint on a Promissory Note.

(Caption.)

1. Allegation of jurisdiction.
2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set

out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ten thousand dollars with interest thereon at the rate of six percent. per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 3.

Cross-Reference.

In connection with this section, see notes concerning pleadings, Form 56.

79. Complaint on an Account.

(Caption.)

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 4.

80. Complaint for Goods Sold and Delivered.

(Caption.)

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 5.

81. Complaint for Money Lent.

(Caption.)

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 6.

82. Complaint for Money Paid by Mistake.

(Caption.)

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [Here state the circumstances with particularity—see Rule 9 (b)].

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 7.

83. Complaint for Money Had and Received.

(Caption.)

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for money had and received from one G.H. on June 1, 1936, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 8.

84. Complaint for Breach of Contract.

(Caption.)

1. Allegation of jurisdiction.

2. On or about the — day of —, 19—, plaintiff and defendant entered into a written contract a copy of which is hereto annexed as "Exhibit A."

3. Plaintiff has duly performed all of the conditions required by said contract to be performed on his part.

4. Defendant has failed to [here insert a statement of the breach] as he was required to do by said contract.

Wherefore, plaintiff demands judgment against defendant in the sum of ten thousand dollars (\$10,000).

 Attorney for plaintiff.

 Address.

Note.

If desired, the contract may be alleged in paragraph 2 by setting it forth ver-

batim in the complaint or by pleading it according to its legal effect.

85. Complaint for Negligence.

(Caption.)

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

Signed: _____,

Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 9.

Note.

The foregoing form was approved in *Hardin v. Interstate Motor Freight System, Inc.* (D. C.-Ohio), 26 Fed. Supp. 97.

NOTES TO DECISIONS**Contributory Negligence.**

While the above complaint does not set forth freedom from contributory

negligence, if the law of the state places on the plaintiff the burden of alleging and showing freedom from contributory

negligence, it has been held that in view of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487, the complaint should affirmatively include such allegation instead of

leaving the matter to be pleaded as an affirmative defense under Rule 12 (c). *Francis v. Humphrey* (D. C.-Ill.), 25 Fed. Supp. 1. See also *Sampson v. Channell* (C. C. A. 1), 110 Fed. (2d) 754.

86. Complaint for Negligence Where Plaintiff is Unable to Determine Definitely Whether the Person Responsible is C. D. or E. F. or Whether Both are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence.

A. B., Plaintiff

v.

C. D. and E. F., Defendants

} Complaint

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ten thousand dollars and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 10.

87. Complaint for Conversion.

(Caption.)

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the — Company (here insert brief identification as by number and issue) of the value of ten thousand dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 11.

88. Complaint for Specific Performance of Contract to Convey Land.

(Caption.)

1. Allegation of jurisdiction.

2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ten thousand dollars.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 12.

Federal Rules of Civil Procedure.

NOTE OF ADVISORY COMMITTEE TO FORM 12 OF APPENDIX OF FORMS:
"Here, as in Form 3 [Form 78 herein],

plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules."

89. Complaint on Claim for Debt and to Set Aside Fraudulent Conveyance Under Rule 18 (b).

A. B., Plaintiff

v.

C. D. and E. F., Defendants

Complaint

1. Allegation of jurisdiction.

2. Defendant C. D. on or about — executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A];

[whereby defendant C. D. promised to pay to plaintiff or order on — the sum of five thousand dollars with interest thereon at the rate of — percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about — conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ten thousand dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

Signed: _____,

Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 13.

90. Complaint for Negligence Under Federal Employer's Liability Act.

(Caption.)

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at — and known as Tunnel No. —.

3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning — dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of — dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of
 — dollars and costs.

Signed: _____,
 Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 14.

91. Complaint for Damages Under Merchant Marine Act.

(Caption.)

1. Allegation of jurisdiction.
2. During all the times herein mentioned defendant was the owner of the steamship — and used it in the transportation of freight for hire by water in interstate and foreign commerce.
3. During the first part of (month and year) at — plaintiff entered the employ of defendant as an able seaman on said steamship under seaman's articles of customary form for a voyage from — ports to the Orient and return at a wage of — dollars per month and found, which is equal to a wage of — dollars per month as a shore worker.
4. On June 1, 1936, said steamship was about — days out of the port of — and was being navigated by the master and crew on the return voyage to — ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)
5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).
6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning — dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of — dollars for medicine, medical attendance, and hospitalization.
7. Plaintiff elects to maintain this action under the provisions of section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007.

Wherefore plaintiff demands judgment against defendant in the sum of
 — dollars and costs.

Signed: _____,
 Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 15.

Statutory Reference.

Suits at law for death or injury of seaman, 10 F. C. A., Title 46, § 688; U. S. C. A., Title 46, § 688; 42 U. S. C.

92. Complaint for Infringement of Patent.

(Caption.)

1. Allegation of jurisdiction.
2. On May 16, 1934, United States Letters Patent No. — were duly and legally issued to plaintiff for an invention in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.
3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.
4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement.

Wherefore plaintiff demands a preliminary and final injunction against further infringement by defendant and those controlled by defendant, an accounting for profits and damages, and an assessment of costs against defendant.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Rule 16.

93. Complaint for Infringement of Copyright and Unfair Competition.

(Caption.)

1. Allegation of jurisdiction.
2. Prior to March 2, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled —.
3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.
4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class —, No. —".
5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of — and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled —, which was copied largely from plaintiff's copyrighted book, entitled —.

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2".

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies in his possession or under his control infringing said copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Rule 17.

94. Complaint for Interpleader and Declaratory Relief.

(Caption.)

1. Allegation of jurisdiction.

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars upon the death of G. H. The policy required

the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

3. No part of the premium due June 1, 1936, was ever paid and the policy ceased to have any force or effect on July 1, 1936.

4. Thereafter, on September 1, 1936, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

5. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

6. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

7. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

Signed: _____,
Attorney for plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 18.

Cross-Reference.

See Rule 22, and notes thereto, as set out under Form 222; Rule 57, and notes thereto, as set out under Form 610.

95. Complaint for Declaratory Judgment.

(Caption.)

1. Allegation of jurisdiction.

2. Plaintiff manufactures and sells, and owns and controls patents covering the construction of —.

3. Defendant has falsely represented to plaintiff's customers and prospective customers and to the trade and public generally by means of letters and publication of advertisements, that by its ownership of the so-called Doe patent No. —, issued on — —, 19—, it possesses the sole right to manufacture and sell — of this type and that the manufacture and sale of such — by any other person would constitute an infringement of the said Doe patent, and by reason of said false representation defendant has interfered with and greatly injured plaintiff's business.

4. The said Doe patent is invalid in that the alleged invention purported to be covered thereby was known and used by others in this country before Doe's invention or discovery thereof.

5. During the months of — and —, 19—, plaintiff had negotiations with various manufacturers of — who desired to secure licenses for the manufacture of — under plaintiff's patents but such prospective licensees terminated their negotiations when they learned of defendant's assertions as to its alleged rights under the Doe patent.

Wherefore, plaintiff demands that the court adjudge:

1. That the Doe patent No. — is invalid.

2. That, if the court determines that the Doe patent is valid, the said patent does not cover all — and, in particular, is not infringed by the — manufactured and sold by plaintiff.

Attorney for plaintiff.

Cross-Reference.

See Rule 57, and notes thereto, as set out under Form 610.

Statutory Reference.

Other grounds of invalidity, 9 F. C. A., Title 35, § 31; U. S. C. A., Title 35, § 31; id. U. S. C.

96. Complaint under the Tucker Act for Breach of Contract.

(Caption.)

1. The action is brought under paragraph 20 of section 24 of the Act of March 3, 1911, 36 Stat. 1093, as amended (U. S. C., Title 28, section 41 (20)) and is founded upon an express contract with the government of the United States. The amount in controversy does not exceed the sum of ten thousand dollars (\$10,000).

2. On or about — —, 19—, plaintiff and defendant entered into an agreement in writing, a copy of which is hereto annexed as "Exhibit A."

3. Plaintiff has duly performed all of the conditions required by said contract to be performed on his part.

4. Defendant has failed to [here insert statement of breach] as he was required to do by said contract.

Wherefore, plaintiff demands judgment against the defendant in the sum of eight thousand dollars (\$8,000).

Attorney for plaintiff.

Address.

(Verification.)

Cross-Reference.

Suits in court of claims against United States, Forms 900-908.

Statutory Reference.

Suits against United States, 7 F. C. A., Title 28, § 41 (20); U. S. C. A., Title 28, § 41 (20); id. U. S. C.; 8 F. C. A., Title 28, §§ 761 to 766; U. S. C. A., Title 28, §§ 761 to 766; id. U. S. C.

97. Complaint to Foreclose a Mortgage in Jurisdiction in Which a Mortgage is a Conveyance.

(Caption.)

1. Allegation of jurisdiction.

2. On the — day of —, 19—, defendant being indebted to plaintiff in the sum of — dollars (\$—), to secure the payment of such sum conveyed certain real property to plaintiff by deed, copy of which is hereto annexed as "Exhibit A," which contained a condition that it be void on payment by defendant to plaintiff on the — day of —, 19—, of the aforesaid sum, with interest thereon, as more fully appears in said deed.

3. No part of the aforesaid sum has been paid, nor the interest thereon, although the time limited for the payment thereof has passed and payment thereof has been duly demanded.

Wherefore, plaintiff demands that the premises described in the aforesaid deed be sold for payment of said sum with interest and that he have such other and further relief as is just.

Attorney for plaintiff.

Address.

Note.

If part of the debt and interest or either has been paid, such fact should be alleged in paragraph 3.

Statutory Reference.

United States as party, 8 F. C. A., Title 28, §§ 902 to 906; U. S. C. A., Title 28, §§ 902 to 906; id. U. S. C.

98. Complaint to Foreclose a Mortgage in Jurisdiction in Which a Mortgage is a Lien.

(Caption.)

1. Allegation of jurisdiction.

2. On the — day of —, 19—, the defendants executed and delivered to plaintiff their bond, a copy of which is hereto annexed as "Exhibit A,"

for the payment to the plaintiff of the sum of ten thousand dollars (\$10,000) on ———, 19—, with interest thereon.

3. As security for the payment of said sum, the defendants executed and delivered to plaintiff a mortgage, copy of which is hereto annexed as "Exhibit B."

4. Defendants have failed to comply with the terms and conditions of the said bond and mortgage by omitting to pay ———, and now owe plaintiff on said bond and mortgage the sum of ——— dollars (\$——).

Wherefore, plaintiff demands:

1. The defendants and all persons claiming under them be foreclosed of all right, title, and interest in and to the said premises.

2. That the said premises be ordered sold.

3. That the proceeds of such sale be used to pay plaintiff the amount due on the bond and mortgage and interest thereon to date of such payment, the expenses of the sale and the costs of this action insofar as the amount of such proceeds will permit.

4. That the defendants be required to pay any deficiency which may remain.

5. That plaintiff have such other and further relief as is just.

Attorney for plaintiff.

Address.

Statutory Reference.

United States as party, 8 F. C. A., Title 28, §§ 902 to 906; U. S. C. A., Title 28, §§ 902 to 906; id. U. S. C.

99. Complaint to Restrain Violations of a Negative Covenant.

(Caption.)

1. Allegation of jurisdiction.

2. On or about ———, 19—, plaintiff and defendant entered into an agreement whereby defendant promised to sing at plaintiff's theater twice a week for ——— months beginning ———, 19—, and not to use her talents at any other theater nor in any concert or reunion, public or private, without the authorization of plaintiff.

3. Plaintiff has duly performed all of the conditions required by said contract to be performed on his part and has not authorized defendant to sing at any place other than at plaintiff's theatre, during the ——— months' period specified in her contract with plaintiff.

4. Defendant has entered into another contract by which she has agreed to sing at a theater other than plaintiff's, namely, ——— Theater, during the ——— months' period specified in her contract with plaintiff.

Wherefore, plaintiff demands that defendant be enjoined from singing at — Theater or at any other theater without authorization of plaintiff during the — months' period specified in her contract with plaintiff.

Signed _____

Address _____

STATE OF _____, }
COUNTY OF _____ } ss:

AB, being first duly sworn, says that he is the above-named plaintiff; that he has read and knows the contents of the foregoing complaint; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

AB.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

Name.

Official character.

Notes.

If no application for a temporary restraining order is contemplated, the verification is unnecessary.

The principal facts alleged in this form were taken from the leading case of Lumley v. Wagner, 1 De G. M. & G.

604, 42 Eng. Repr. 687. The foregoing complaint illustrates the simplicity of the new forms of pleading as contrasted with the complexity and prolixity of a bill of complaint under the old practice. See summary of bill of complaint in the report of the case.

100. Complaint by Subcontractor for Labor and Material under the Heard Act.

District Court of the United States

_____ District of _____

United States of America, for the
Use of John Doe,

Plaintiff,

v.

AB Construction Co. and CD Surety
Co.

Defendants.]

Civil No. _____
Complaint

1. The action arises under the Act of August 24, 1935, 49 Stat. 793 (U. S. C., Title 40, sections 270a to 270d), as hereinafter more fully appears.

2. On or about —, —, 19—, defendant AB Construction Co. entered into a contract with the United States for the construction of a post-office building at —.

3. On or about — —, 19—, defendant AB Construction Co. executed and delivered a bond to the United States in the sum of — dollars (\$—), on which said defendant was principal and defendant CD Surety Co. was surety. Said bond was conditioned upon the prompt payment of persons supplying labor and material in the prosecution of the work provided for in the contract referred to in paragraph 2 hereof.

4. On or about — —, 19—, plaintiff John Doe entered into a contract with the defendant AB Construction Co., copy of which is hereto annexed as "Exhibit A," whereby said John Doe agreed to furnish the necessary labor and material for the installation of the heating system for the said post-office building.

5. Plaintiff John Doe has duly performed all of the conditions required to be performed on his part by said contract referred to in paragraph 4 hereof.

6. Defendant AB Construction Co. has failed to pay to plaintiff John Doe the sum required to be paid by said contract, or any part thereof, except the sum of — dollars (\$—), and still owes the plaintiff John Doe the sum of — dollars (\$—).

Wherefore, plaintiff demands judgment against the defendants for the use of John Doe in the sum of — dollars (\$—), with interest from — —, 19—, together with the costs of this action.

Attorney for plaintiff.

Address.

Statutory Reference.

Suits on public building bonds, 9A,
F. C. A., Title 40, §§ 270a to 270d; U. S.

C. A., Title 40, §§ 270a to 270d; id. U.
S. C.

101. Complaint by Trustee in Bankruptcy to Set Aside Fraudulent Conveyance.

(Caption.)

1. Allegations of jurisdiction.

2. On — —, 19—, John Doe of — — was adjudged a bankrupt by order of the District Court of the United States for the — District of —, and thereafter plaintiff was duly appointed and qualified as trustee of the estate of the said bankrupt.

3. Within — months prior to such adjudication, John Doe transferred certain assets, valued at approximately five thousand dollars (\$5,000), to the defendant, with the intent to hinder, delay, and defraud the creditors of the said John Doe and to remove said assets from his ownership so as to prevent said creditors from satisfying their claims therefrom.

Wherefore, plaintiff demands judgment against the defendant setting aside the aforesaid transfer and requiring the defendant to deliver said assets over to plaintiff or to account for the same.

Attorney for plaintiff.

Address.

Note.

A complaint along the foregoing lines was sustained in *Macleod v. Cohen-*

Erichs Corp. (D. C.-N. Y.), 28 Fed. Supp. 103.

102. Complaint for Negligent Manufacture and Distribution of a Dynamite Cap.

(Caption.)

1. Allegation of jurisdiction.
2. Heretofore, the defendant negligently manufactured and distributed a dynamite cap constructed in such a fashion that it was unable to withstand the crimping to which the defendant knew it would be subjected, and that it would explode upon being crimped. The cap was supplied to plaintiff by his employer in due course of business. While the plaintiff was crimping it in preparing a charge of dynamite, said cap prematurely exploded.
3. As a result, plaintiff was thrown down and suffered the loss of three fingers of his left hand and was otherwise injured, was prevented from performing gainful services for a long period of time, suffered great pain of body and mind, and incurred great expenses for medical attention and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of _____ dollars (\$——) and costs.

Attorney for plaintiff.

Address.

Note.

A complaint along the foregoing lines was held sufficient in *Sierocinski v. E. I.*

DuPont de Nemours & Co. (C. C. A. 3), 103 Fed. (2d) 843.

103. Complaint for Unfair Competition.

(Caption.)

1. Allegation of jurisdiction.
2. On or about ———, 19—, plaintiff acquired the assets, business, good will, and trade name, "People's Clothing Company," from ——— and for more than ——— years plaintiff and its predecessors have operated and

conducted several stores under the trade name of "People's Clothing Company," at —, —, and —.

3. Since — —, 19—, defendant, under the name of "People's Household Supply Company," has operated stores in some of the cities in which plaintiff has its stores, to wit, at — and —.

4. Through its agents and employees, defendant has solicited business with words, actions, conduct, and silence, calculated to deceive the public and plaintiff's customers into believing that they were dealing with plaintiff. The public and said customers of plaintiff have been and are being deceived by such action on the part of defendant, to the great injury of plaintiff's business.

Wherefore, plaintiff demands:

1. That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from in any manner representing that the defendant's stores are owned or conducted by plaintiff, or that persons trading at defendant's stores are in fact trading with plaintiff; from in any manner inducing or leading any one to trade at a store of the defendant in the belief that he was trading at a store of the plaintiff; and from using the word, "People's" in the name of his stores, without affirmatively indicating that his stores were not owned or operated by plaintiff.

2. That defendant pay to plaintiff the costs of this action.

3. That plaintiff have such other and further relief as is just.

Attorney for plaintiff.

Address.

Note.

The sufficiency of a complaint containing the allegations in the foregoing

form was sustained in *Ellay Stores, Inc. v. Savitz* (D. C.-Pa.), 29 Fed. Supp. 804.

104. Complaint Against Owner of Car for Injuries Negligently Inflicted.

(Caption.)

1. Allegation of jurisdiction.

2. On — —, 19—, plaintiff was driving his automobile on — Street near — Street, in —, —, when an automobile belonging to defendant AB, and operated by defendant CD, with the knowledge and consent of the said AB, was negligently driven by the said CD into plaintiff's automobile.

3. As a result plaintiff's automobile was overturned and greatly damaged, and plaintiff was thrown out and had his arm broken, and was otherwise injured, was prevented from transacting his business for a long period of time, suffered great pain of body and mind, and incurred great expense for medical attention and hospitalization and for repairs to his automobile.

Wherefore, plaintiff demands judgment against defendant in the sum of
 — dollars (\$—).

 Attorney for plaintiff.

 Address.

Note.

Allegations similar to those in the above form were held sufficient in a state where knowledge and consent on the part of the owner that his automom-

bile was used by another imposes liability upon the owner for injuries negligently inflicted. *D'Allessandro v. Bechtel* (C. C. A. 5), 104 Fed. (2d) 845.

105. Complaint in Stockholders' Representative Suit in Behalf of Corporation.

AB,

Plaintiff,

v.

XY Co., Inc., CD, EF, and GH,

Defendants.

Civil No. —
 Complaint

1. Allegations of jurisdiction.
2. (a) The plaintiff is now and was at the time of the transactions herein complained of, a stockholder of the defendant XY Co., Inc., owning and holding — shares of — stock thereof.
 (b) The plaintiff is now a stockholder of the defendant XY Co., Inc., owning and holding — shares of — stock thereof. The said shares devolved on him by operation of law, to wit: —.
3. The plaintiff brings this suit in the right of said corporation as a stockholder thereof in behalf of himself and all other stockholders similarly situated.
4. (Here allege a cause of action in behalf of XY Co., Inc., against defendants CD, EF, and GH, as for example, fraudulent or negligent diversion of corporate assets.)
5. The action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.
6. (a) The plaintiff made diligent efforts to secure from the managing directors (or trustees) and from the stockholders, action to enforce the right of the corporation herein asserted, as follows:
 On — —, 19—, he presented a demand to the board of directors to cause the corporation to bring suit against the individual defendants herein to enforce the aforesaid cause of action but the board failed, neglected, and refused to do so. Thereupon on — —, 19—, at the annual meeting of the stockholders he made a demand that the meeting order the said board and the officers of the corporation to bring such suit, but the said meeting failed, neglected, and refused to do so.

(b) The plaintiff made no effort to secure action in the premises from the managing directors (or trustees) because [here state reason, as for example, the individual defendants herein against whom the claim is asserted form a majority of the board of directors and control said board, and it would, therefore, have been futile to make a demand on said board that it bring this suit].

Wherefore, the plaintiff demands judgment in favor of defendant XY Co., Inc., against defendants CD, EF, and GH, that they account to said defendant XY Co., Inc., for its assets fraudulently and unlawfully diverted as aforesaid, and that defendant XY Co., Inc., recover of the other defendants the amount found due on such accounting with interest; that the plaintiff recover his costs, expenses, and counsel fees; and plaintiff prays for such other and further relief as to the court may seem just.

Attorney for plaintiff.

Address.

STATE OF _____, }
COUNTY OF _____. } ss:

AB, being first duly sworn, says that he is the above-named plaintiff; that he has read and knows the contents of the foregoing complaint; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

AB.

Subscribed and sworn to before me this ____ day of ____, 19__.

[SEAL]

Name.

Official character.

Note.

Use either (a) or (b) of par. 2 and par. 6.

Federal Rules of Civil Procedure.

"In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court

of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." Rule 23 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 23 (b). "This is Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v. Oakland*, 104 U. S. 450 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U. S. IX."

NOTES TO DECISIONS

Secondary Action by Shareholders [Rule 23 (b)].

Plaintiffs in a representative stockholders' suit against the company and its directors for an accounting for mismanagement and conspiracy to defraud the company and its stockholders must allege and prove that plaintiffs were shareholders at the time of the transactions of which complaint is made or that their holdings have since come to them by operation of law. *Rinn v. Asbestos Mfg. Co.* (C. C. A. 7), 101 Fed. (2d) 344.

A claim to adjudicate plaintiff's status as a stockholder may be joined in the same action with a claim to enforce a secondary right on behalf of the corporation. *Richardson v. Blue Grass Min. Co.* (D. C.-Ky.), 29 Fed. Supp. 658.

In a stockholder's derivative suit, diversity of citizenship between the plaintiff and the corporate defendant is not necessary to support federal jurisdiction. *Richardson v. Blue Grass Min. Co.* (D. C.-Ky.), 29 Fed. Supp. 658.

The owner of an equitable interest in corporate stock is entitled to maintain a stockholder's derivative suit. *Richardson v. Blue Grass Min. Co.* (D. C.-Ky.), 29 Fed. Supp. 658.

In a stockholder's derivative suit, other stockholders should not be permitted to intervene as parties plaintiff if the interests of all stockholders are amply protected as a result of the pendency of other actions involving the same subject-matter. *Bachrach v. General Inv. Corp.* (D. C.-N. Y.), 29 Fed. Supp. 966.

An additional stockholder should not be permitted to intervene in a stockhold-

er's suit in the absence of a showing that applicant has made demand for desired action on officers and directors of the corporation. *Bachrach v. General Inv. Corp.* (D. C.-N. Y.), 29 Fed. Supp. 966.

A stockholder in a holding company may maintain a derivative suit for illegal acts of the directors of a subsidiary corporation wholly owned by the holding company. *Piccard v. Sperry Corp.* (D. C.-N. Y.), 30 Fed. Supp. 171.

In a stockholder's derivative action, the fact that plaintiff is holder of only a few shares of stock is not a valid objection to taking deposition of defendant directors. *Piccard v. Sperry Corp.* (D. C.-N. Y.), 30 Fed. Supp. 171.

The complaint in a stockholder's derivative action, removed from a state court solely on the ground of a federal question, need not aver that plaintiff was a shareholder at the time of the transaction of which he complains or that his share devolved on him by operation of law. *Jablow v. Agnew* (D. C.-N. Y.), 30 Fed. Supp. 718.

In a stockholder's derivative action, claims against defendants, some of whom are directors of one corporation and some of whom are trustees in bankruptcy and reorganization proceedings of another corporation, should be separately stated and numbered. *Jablow v. Agnew* (D. C.-N. Y.), 30 Fed. Supp. 718.

A stockholder's derivative action should be clearly alleged as such. *Dellefield v. Blockdel Realty Co., Inc.* (D. C.-N. Y.), 59 Bull. 21, 1 Fed. R. Dec. 42.

106. Complaint to Annul a Contract for Fraud.

(Caption.)

1. Allegation of jurisdiction.
2. On ———, 19—, the plaintiff was the owner of a farm in ——— [briefly describing it].
3. The plaintiff was then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business.
4. The defendant, on that day, fraudulently taking advantage of the plaintiff's incapacity, procured his signature to a certain writing, without paying him any consideration therefor, which writing he falsely and fraudulently represented to be a subscription to the ——— Magazine for one year.

5. The plaintiff on ———, 19—, applied to the defendant for information as to the contents of said writing; but defendant refused to give him any information concerning it.

6. The plaintiff is informed and believes and therefore avers that said writing is a deed of said farm or some interest therein, to the defendant; and that he intends to use the same for his own benefit, and to the prejudice of the plaintiff.

The plaintiff claims judgment,

1. That said writing is void;
2. That the defendant produce the same, and deliver it up to be canceled;
3. That he be enjoined against making any conveyance of any title, which he may claim under the same.

Attorney for plaintiff.

Address.

Source of Form.

The above form was taken from Form 292 of the Connecticut Practice Book, 1934, and is believed to aver fraud with particularity sufficient to meet the requirements of Rule 9 (b) of the Federal Rules of Civil Procedure.

mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Rule 9 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 9 (b): "See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22."

Federal Rules of Civil Procedure.

"In all averments of fraud or mistake, the circumstances constituting fraud or

NOTES TO DECISIONS

Fraud, Mistake, Condition of the Mind [Rule 9 (b)].

Although fraud may not be alleged generally, intent may be so alleged and defendant is not entitled to further particulars as to its own fraudulent intent. *E. I. DuPont De Nemours & Co. v. DuPont Textile Mills, Inc.* (D. C.-Pa.), 26 Fed. Supp. 236.

A declaration in libel sufficiently charges malice when it alleges that a letter was maliciously written, without alleging specific facts. *Love v. Commercial Casualty Co.* (D. C.-Miss.), 26 Fed. Supp. 481.

In an action by trustee in bankruptcy to set aside transfers of assets of the

bankrupt to defendant as fraudulent and preferential, an allegation that the transfers were made while debtor was insolvent with intent to hinder, delay, and defraud creditors is a sufficient allegation of fraud. *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103.

A complaint in an action based on fraud is defective if it fails to state with particularity the circumstances constituting the fraud, and a bill of particulars may be ordered. *Zimmerman v. National Dairy Products Corp.* (D. C.-N. Y.), 30 Fed. Supp. 438; *McCarthy v. Schumacher* (D. C.-N. Y.), 57 Bull. 12.

107. Complaint for Rescission of a Contract on the Ground of Mistake.

.(Caption.)

1. Allegation of jurisdiction.

2. On ———, 19—, the defendant represented to the plaintiff that a certain farm belonging to the defendant, in the town of ———, and state of Massachusetts, contained, by actual survey, ——— acres.

3. The plaintiff was thereby induced to purchase the same at the price of ten thousand dollars (\$10,000), in the belief that said representation was true, and signed an agreement, of which the defendant has a duplicate, and of which a copy is hereto annexed, marked "Exhibit A"; but no deed of the farm has been executed to him.

4. On ———, 19—, the plaintiff paid the defendant one thousand dollars (\$1,000) as part of such purchase-money.

5. Said farm contained in fact only ——— acres, whereby the value of said premises was materially lessened.

6. The plaintiff, on ———, 19—, notified the defendant that he found said farm to contain only ——— acres, and that, for this cause, he rescinded said contract, and demanded that it be delivered up to him, and said one thousand dollars (\$1,000) returned.

The plaintiff claims,

1. Twelve hundred dollars (\$1,200) damages;
2. That said agreement be delivered up and canceled.

Attorney for plaintiff.

Address.

Source of Form.

The above form is taken from Form 295 of Connecticut Practice Book, 1934, and is presented to show the degree of particularity required in averments of

mistake under Rule 9 (b) of the Federal Rules of Civil Procedure.

Cross-Reference.

See notes to Form 106.

108. Complaint by United States for Collection of Taxes.

.(Caption.)

1. Plaintiff is the United States of America and brings this action under Internal Revenue Code, section 3744.

2. Defendant is an inhabitant of the ——— Judicial District of ———.

3. On or about ———, 19—, defendant filed his individual federal income tax return for the calendar year ——— with the collector of internal revenue for the ——— Collection District of ———, reporting a tax due of ——— dollars (\$——), which he paid.

4. On or about ———, 19—, the commissioner of internal revenue made a deficiency assessment against the defendant for said period in the

sum of — dollars (\$—), consisting of tax in the sum of — dollars (\$—) and interest in the sum of — dollars (\$—).

5. On or about — —, 19—, due notice of said deficiency assessment was given to defendant and demand for payment thereof was made.

6. On account of said deficiency assessment the defendant made payments aggregating the sum of — dollars (\$—), as follows:

On — —, 19—	\$—
On — —, 19—	\$—

7. The defendant owes the plaintiff the balance of said deficiency assessment amounting to the sum of — dollars (\$—) with interest.

Wherefore, plaintiff demands judgment against the defendant for the sum of — dollars (\$—) with interest and costs.

United States attorney.

By _____
Assistant United States attorney.

109. Complaint Against Collector for Refund of Taxes Illegally Collected.

(Caption.)

1. This action arises under the Revenue Act of —, 19—, — Stat. —, as amended.

2. Defendant is and was at all times hereinafter mentioned the collector of internal revenue for the — Collection District of —.

3. On or about — —, 19—, plaintiff filed his individual federal income tax return for the calendar year 19—, with the defendant as such collector, reporting a tax due of — dollars (\$—) which he paid to defendant as such collector.

4. On or about — —, 19—, the commissioner of internal revenue erroneously made a deficiency assessment against the plaintiff for said period in the sum of — dollars (\$—), consisting of tax in the sum of — dollars (\$—) and interest in the sum of — dollars (\$—), which deficiency was paid to defendant as such collector by plaintiff on or about — —, 19—.

5. On or about — —, 19—, plaintiff filed with the defendant a claim for the refund of tax and interest paid by plaintiff for said period in the sum of — dollars (\$—), and set forth therein as grounds for recovery that the commissioner of internal revenue erroneously [here set forth grounds].

6. On or about — —, 19—, the commissioner of internal revenue notified plaintiff by registered mail that said claim for refund had been disallowed in its entirety (as to — dollars (\$—) thereof).

7. The above-mentioned assessment was erroneously made and illegally exacted from plaintiff for the reasons set forth in said claim for refund.

8. The defendant owes the plaintiff the said sum of — dollars (\$—) with interest thereon from — —, 19—.

Wherefore, plaintiff demands judgment against the defendant for the sum of — dollars (\$—) with interest from — —, 19—, and costs.

Attorney for plaintiff.

Address.

NOTES TO DECISIONS

Conditions Precedent [Rule 9 (c)].

The filing of a claim with the commissioner of internal revenue and either its denial or a lapse of six months after the date of filing such claim is a condition precedent to the maintenance of an ac-

tion for the refund of tax alleged to have been erroneously collected, 6A, F. C. A., Title 26, § 3772; U. S. C. A., Title 26, § 3772; id. U. S. C. Rock Island, A. & L. R. Co. v. United States, 254 U. S. 141, 65 L. ed. 188, 41 Sup. Ct. 55.

110. Complaint Against the United States on a Contract of Government Life Insurance.

District Court of the United States

— District of —

Mary Doe, individually and as Administratrix of the Estate of John Doe,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. —
Complaint

COUNT I

1. This action arises under the War Risk Insurance Act of October 6, 1917, 40 Stat. 409, and the World War Veterans Act, 1924, 43 Stat. 607, and amendatory acts (U. S. C., Title 38, section 445 and following and section 511 and following) and is based upon a contract of United States government life insurance between John Doe, now deceased, and the defendant.

2. Plaintiff is the duly appointed, qualified, and acting administratrix of the estate of the said John Doe, deceased.

3. On or about — —, 19—, the said John Doe and the defendant duly entered into a contract of government life insurance, a copy of which is hereto annexed as "Exhibit A."

4. The said John Doe duly performed all the conditions required by said contract of insurance to be performed on his part.

5. On or about — —, 19—, the said John Doe became totally and permanently disabled, by reason of which fact the said policy matured.

The said John Doe continued to be totally and permanently disabled until his death, which occurred on or about ———, 19—. The said John Doe was entitled to receive ——— monthly payments of ——— dollars (\$——) each, amounting in the aggregate to the sum of ——— dollars (\$——), which is now owing to his estate.

6. Plaintiff, as the administratrix of the estate of John Doe has duly made claim to the administrator of veterans' affairs for the sum owing to said estate, which claim was refused and denied and a disagreement now exists between plaintiff and the United States veterans' administration as to said claim.

COUNT II

7. Plaintiff adopts all of the allegations contained in paragraphs 1, 2, 3, 4, and 5 of Count I as part of Count II.

8. Plaintiff was designated as the sole beneficiary of said contract of insurance and as such beneficiary is entitled to receive the sum of ——— dollars (\$——).

9. Plaintiff has duly made claim to the administrator of veterans' affairs for the sum owing to her as beneficiary of said contract of insurance, which claim was refused and denied and a disagreement now exists between plaintiff and the United States veterans' administration as to said claim.

Wherefore, plaintiff demands that defendant be required to pay (1) the sum of ——— dollars (\$——) to plaintiff as administratrix of the estate of John Doe, and (2) the sum of ——— dollars (\$——) to plaintiff individually.

Attorney for plaintiff.

Address.

Statutory Reference.

Suits against the United States, 7 F. C. A., Title 28, § 41 (20); U. S. C. A.,

Title 28, § 41 (20); id. U. S. C.; 8 F. C. A., Title 28, §§ 761 to 766; U. S. C. A., Title 28, §§ 761 to 766; id. U. S. C.

NOTES TO DECISIONS

Conditions Precedent [Rule 9 (a)].

The filing of a claim and its denial, constituting a disagreement, is a jurisdictional prerequisite to the maintenance of an action on a contract of war risk insurance. *Wilson v. United States* (C.

C. A. 10), 70 Fed. (2d) 176; *McLaughlin v. United States* (C. C. A. 10), 74 Fed. (2d) 506; *United States v. Journey* (C. C. A. 10), 82 Fed. (2d) 772; *Johnson v. United States* (C. C. A. 10), 102 Fed. (2d) 729.

111. Complaint to Cancel Certificate of Citizenship for Establishing Permanent Residence Abroad.

(Caption.)

1. This action arises under section 15 of the Act of June 29, 1906, 34 Stat. 601, as amended (U. S. C., Title 8, section 405).

2. Prior to — — —, 19—, defendant was a resident and inhabitant of — — —, in this district, but is now absent from the United States and has been absent therefrom since on or about — — —, 19—, and is now residing abroad, at — — —.

3. On or about — — —, 19—, a judgment was entered by this court purporting to admit defendant to be and become a citizen of the United States, and a certified copy of the said judgment was delivered to defendant.

4. The said judgment and the said certificate of citizenship were illegally and fraudulently procured by defendant, in that at the time of filing of his petition for naturalization, it was not his intention to become a permanent citizen of the United States.

5. Subsequent to the date of the aforesaid judgment, and within five years thereafter, defendant, on or about — — —, 19—, left the United States and took up his permanent residence in — — —, where he has since resided with no definite intention of ever returning to the United States for permanent residence.

6. On or about — — —, 19—, before — — —, Consul of the United States of America at — — —, defendant executed a waiver and consent herein, consenting to the entry of a judgment by the appropriate District Court of the United States canceling the aforesaid certificate of citizenship and enjoining defendant forever from setting up or claiming any rights, privileges, benefits, or advantages under it, and further consenting that said judgment may be entered without further notice to defendant.

Wherefore, plaintiff demands that the judgment of naturalization aforesaid be canceled, that defendant be required to surrender the certified copy of the certificate of citizenship delivered to him, and that he be forever enjoined and restrained from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under the said judgment of naturalization, and that plaintiff have such other and further relief as may seem just.

United States attorney.

Address.

112. Complaint for Cancellation of Certificate of Citizenship for Fraud in its Procurement.

(Caption.)

1. The action arises under section 15 of the Act of June 29, 1906, 34 Stat. 601, as amended (U. S. C., Title 8, section 405).

2. Defendant resides within the jurisdiction of this court, to wit, at — — —.

3. — — —, defendant, a native and subject of — — —, was admitted to citizenship before the — — — Court of — — —, at — — —, on — — —, 19—, certificate of citizenship No. — — —, being issued to him on the date last mentioned.

4. The said certificate of citizenship was secured by defendant fraudulently and illegally and by means of and as a result of false statements made by defendant.

5. Defendant made declaration of intention No. — on — —, 19—, in the — Court of — at —, which declaration said defendant used as the basis for a petition for citizenship, No. —, filed in the same court on — —, 19—.

6. Defendant alleged in said petition that he arrived in the United States on — —, 19—, at —, —, and that he had resided continuously in the United States since the date of such entry and continuously in the state of — since — —, 19—.

7. Said allegations were false and were known by defendant to be false at the time said allegations were made, in that subsequently to his admission to the United States for permanent residence on — —, 19—, defendant went to Canada and on — —, 19—, was excluded from the United States by a board of special inquiry at —, —, upon the ground that [here insert grounds]; and that subsequently to such exclusion the said defendant reentered the United States but was never lawfully admitted to the United States for permanent residence.

Wherefore, plaintiff demands that the decree of naturalization aforesaid be canceled; that defendant be required to surrender the certified copy thereof delivered to him and that he be forever restrained from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under the said decree and that plaintiff have such other and further relief as may seem just.

United States attorney.

Address.

ENGLISH FORMS

The following four forms have been prescribed by the Orders of the English High Court of Judicature. While they are exceedingly brief, they seem to constitute sufficient compliance with the requirements of the Federal Rules of Civil Procedure, if appropriate jurisdictional averments and a demand for relief are included.

113. Payee Against Maker of a Promissory Note.

(Caption.)

The plaintiff's claim is against the defendant as maker of a promissory note for £250, dated 1st January, 1899, payable four months after date.

Particulars:—	£
Principal	250
Interest	10
	<hr/>
Amount due	<u>£260</u>

(Signed)

Note.

It would appear desirable that this form should show to whom the promissory note is payable.

114. Negligent Driving.

(Caption.)

The plaintiff has suffered damage from personal injuries to the plaintiff and damages to his carriage, caused by the defendant or his servant on the 15th of January, 1899, negligently driving a cart and horse in Fleet Street.

Particulars of expenses, &c.	£	s.	d.
Charges of Mr. Smith, surgeon.....	10	10	0
Charges of Mr. Jones, coachmaker.....	14	5	6
	<hr/>		
	<u>£24</u>	<u>15</u>	<u>6</u>

The plaintiff claims £150.

(Signed)
Delivered

115. Lord Campbell's Act.

(Caption.)

The plaintiff, as executor of CD, deceased, brings this action for the benefit of Eva the wife (widow), and William and Margaret and Dorothea, the children of CD (as the case may be), who have suffered damage from the defendant's negligence, in carrying the said CD by omnibus, whereby the said CD was killed in Cornhill on the 15th of January, 1899.

Particulars pursuant to Statute are delivered herewith.

The plaintiff claims £500.

(Signed)
Delivered

116. Injunction and Damages for Infringement of Patent.

(Caption.)

The defendant has infringed the plaintiff's patent, No. 14084, granted for the term of 14 years, from the 21st of May, 1896, for certain improve-

ments in the manufacture of iron and steel, whereof the plaintiff was the first inventor.

The plaintiff claims an injunction to restrain the defendant from further infringement and £100 damages.

Particulars of breaches are delivered herewith.

(Signed)

. Delivered

NEW JERSEY FORM

The following brief form prescribed by the New Jersey Practice is believed to comply with the requirements of the Federal Rules of Civil Procedure, if appropriate jurisdictional averments are included.

117. For Rent.

(Caption.)

FIRST COUNT

1. On ———, 19—, plaintiff and defendant executed a lease (under seal) of the premises No. ——— Street, ———, of which a copy is annexed hereto.

2. A half year's rent of ——— dollars (\$——) due ———, 19— is unpaid.

Plaintiff demands

1. As damages ——— dollars (\$——) and interest from ———, 19—, on the first count (P. L. 1912, p. 403).

SECTION 4

SPECIAL ALLEGATIONS

Form

120. Capacity to sue.

121. Conditions precedent.

122. Official documents and acts.

123. Judgments and orders.

Form

124. Omission of parties.

125. Loss of employment in action for libel.

126. Loss from inability to resell goods.

120. Capacity to Sue.

1. The plaintiff is the executor under the last will and testament of AB, deceased.

2. The plaintiff is the administrator with the will annexed of the estate of AB, deceased.

3. The plaintiff is the administrator of the goods, chattels, and credits of AB, deceased.

4. The plaintiff is the receiver of the assets of AB (or of CD corporation).

5. The plaintiff is the general guardian of AB, an infant.

6. The plaintiff is the committee of the person and property of AB, an incompetent person.

7. The plaintiff is the guardian ad litem of AB, an infant (or, an incompetent person, as the case may be).

8. The plaintiff is the next friend of AB, an infant (or an incompetent person, as the case may be).

9. The plaintiff is the trustee designated by the — mortgage made by — Corporation, and dated — (or insert other appropriate description of trust).

Cross-References.

Capacity to sue or be sued, see Rule 17 (a), (b), and (c), as set out under Form 56.

In connection with this section, see notes concerning pleadings, Form 56.

Federal Rules of Civil Procedure.

"It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the ca-

capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Rule 9 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 9 (a): "Compare Equity Rule 25 (Bill of Complaint—Contents) requiring disability to be stated; Utah Rev. Stat. Ann. (1933), § 104-13-15, enumerating a number of situations where a general averment of capacity is sufficient. For provisions governing averment of incorporation, see 2 Minn. Stat. (Mason, 1927) § 9271; N. Y. R. C. P. (1937) Rule 93; 2 N. D. Comp. Laws Ann. (1913) § 7981 et seq."

NOTES TO DECISIONS

Capacity [Rule 9 (a)].

In an action against the United States on a war risk insurance policy, plaintiff must allege capacity to sue to the extent required to show the jurisdiction of the court. *Jewell v. United States* (D. C.-Ky.), 27 Fed. Supp. 836.

An action against the United States on a war risk insurance policy brought

by plaintiff as sole heir of the insured, which action was dismissed on the ground that it was barred by the statute of limitations, may not be reinstated and consolidated with a subsequent action brought by the same plaintiff as beneficiary under the policy. *Jewell v. United States* (D. C.-Ky.), 27 Fed. Supp. 836.

121. Conditions Precedent.

The plaintiff has duly performed all the conditions required by said contract to be performed on his part.

Federal Rules of Civil Procedure.

"In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or

have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Rule 9 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 9 (c): "The codes generally have this

or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 14; 2 Minn. Stat. (Mason, 1927) § 9273; N. Y. R. C. P.

(1937) Rule 92; 2 N. D. Comp. Laws Ann. (1913) § 7461; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 288."

122. Official Documents and Acts.

1. On —, United States Letters Patent No. — were duly and legally issued to the plaintiff.

Federal Rules of Civil Procedure.

"In pleading an official document or official act it is sufficient to aver that

the document was issued or the act done in compliance with law." Rule 9 (d).

123. Judgments and Orders.

1. On — —, 19—, — Court of —, duly rendered judgment in an action wherein AB was plaintiff and CD was defendant. By said judgment it was provided that said AB recover of said CD the sum of — dollars (\$—).

2. On —, the National Labor Relations Board in a proceeding entitled "—," duly made an order that —.

Federal Rules of Civil Procedure.

"In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it." Rule 9 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 9 (e): "The rule expands the usual code provisions on pleading a judgment by including judgments or decisions of administrative tribunals and foreign courts. Compare Ark. Civ. Code (Crawford, 1934) § 141; 2 Minn. Stat. (Mason, 1927) § 9269; N. Y. R. C. P. (1937) Rule 95; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 287."

124. Omission of Parties.

1. AB is jointly liable on said contract with defendant CD, but is not joined as a party to this action, because he is not within the jurisdiction of this court.

2. AB is cotrustee with plaintiff herein but refuses to join as a party plaintiff and can not be joined as a party defendant because he is not within the jurisdiction of this court.

Federal Rules of Civil Procedure.

"In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall

state why they are omitted." Rule 19 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 19 (c): "For the substance of this rule see the fourth subdivision of Equity Rule 25 (Bill of Complaint—Contents)."

125. Loss of Employment in Action for Libel.

As a result of the publication of said libel, plaintiff was discharged from his employment as cashier of the — Bank, and has been obliged to accept employment as a common laborer as a means of livelihood.

126. Loss from Inability to Resell Goods.

As a result of the breach of said contract, plaintiff suffered special damages in that he had contracted to resell the goods at a profit which fact was well known to defendant but he could not do so for the reason that he could not purchase said goods in the open market.

Federal Rules of Civil Procedure.

"When items of special damage are claimed, they shall be specifically stated."
Rule 9 (g).

NOTES TO DECISIONS**In General.**

In an action for specific performance, a general allegation of damages in the alternative prayer for relief is objectionable as a mere conclusion of law. The elements of such alleged damage

should be stated to enable the court to determine whether a right to recover exists. Such prayer should be dismissed. *Gray v. Schoonmaker* (D. C.-Ill.), 30 Fed. Supp. 1019.

CHAPTER 5

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Form

- 135. Temporary restraining order and order setting down application for preliminary injunction for hearing.
- 136. Temporary restraining order and rule to show cause for preliminary injunction.
- 137. Temporary restraining order and rule to show cause for preliminary injunction (alternative form).
- 138. Security for restraining order.
- 139. Temporary restraining order granted without notice.
- 140. Motion for preliminary injunction.
- 141. Notice of motion for preliminary injunction.
- 142. Order denying motion for preliminary injunction.
- 143. Notice of motion to vacate or modify preliminary injunction.

Form

- 144. Order restoring preliminary injunction pending appeal.
- 145. Order denying motion to set aside judgment for injunction.
- 146. Final order denying injunction and dismissing complaint.
- 147. Restraining provisions for inclusion in injunction.
 - (1) Patent infringement.
 - (2) Trade-mark infringement.
 - (3) Copyright infringement.
 - (4) Unfair competition.
 - (5) Negative covenant in contract for services.
 - (6) Negative covenant running with the land.
 - (7) Nuisance.
 - (8) Prosecution of another suit.
 - (9) Ultra vires transaction.

INTRODUCTION.—A temporary restraining order may be granted without notice only on the basis of an affidavit or verified complaint clearly showing by specific facts that otherwise immediate and irreparable injury, loss or damage will result to the applicant. Such order must define the injury and state why it is irreparable and why the order was granted without notice. The order must state when it is to expire, and the date of expiration must be not later than ten days after entry. Before it expires, it may be, for good cause shown, extended for a like period. The reasons for the extension must be entered of record. The temporary restraining order must also set forth the reasons for its issuance; must be specific in its terms; and must describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be enjoined.

If granted without notice, the temporary restraining order must be indorsed with the date and hour of its issuance, and must be forthwith filed in the clerk's office.

The adverse party may move on two days' notice to dissolve or modify the restraining order.

In actions involving labor disputes, care must be exercised to comply with the provisions of the Norris-LaGuardia Act in respect to temporary re-

straining orders and preliminary injunctions (9 F. C. A., Title 29, §§ 101 to 115; U. S. C. A., Title 29, §§ 101 to 115; id. U. S. C.).

135. Temporary Restraining Order and Order Setting Down Application for Preliminary Injunction for Hearing.

(Caption.)

It appearing from the verified complaint herein that immediate and irreparable injury, loss, and damage will result to plaintiff before notice can be served and a hearing had on the application for a temporary restraining order contained in said complaint if defendant [here set out threatened action by defendant]; and it appearing that the said defendant is about to [threatened action by defendant] and will do so unless restrained; and if such acts are committed by defendant, rights may be acquired by parties not subject to process of this court to the irreparable injury of plaintiff (or give other pertinent reason), and in such case any order or judgment which this court may later issue on plaintiff's application for a preliminary injunction or for a permanent injunction will be ineffective, it is

Ordered, that defendant, —, his agents, servants, employees, attorneys, and all persons in active concert or participation with them, are hereby restrained from [action desired restrained]; provided that plaintiff — first give security in the sum of — dollars (\$—) in the form and manner required by law; and it is further

Ordered, that this temporary restraining order remain in effect until and including the — day of —, 19—, or until further order of this court and the application for preliminary injunction contained in the complaint herein is set down for a hearing at — — M. of the — day of —, 19—, or as soon thereafter as counsel can be heard.

Date—.

United States district judge.

Cross-References.

Pleading generally, see notes to Form 56.

Order denying application for preliminary injunction and dismissing action, Form 542.

Statutory Reference.

Injunctions and restraining orders generally, 8 F. C. A., Title 28, §§ 378 to 383; U. S. C. A., Title 28, §§ 378 to 383; id. U. S. C.

Federal Rules of Civil Procedure.

"No preliminary injunction shall be issued without notice to the adverse party." Rule 65 (a).

"No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from

specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The rea-

sons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." Rule 65 (b).

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Rule 65 (d).

"These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress." Rule 65 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 65 (a) and (b): "These are taken from U. S. C., Title 28, § 381 (Injunctions; preliminary injunctions and temporary restraining orders)."

NOTE OF ADVISORY COMMITTEE TO RULE 65 (d): "This is substantially U. S. C., Title 28, § 883 (Injunctions; requisites of order; binding effect)."

NOTE OF ADVISORY COMMITTEE TO RULE 65 (e): "The words 'relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee' are words of description and not of limitation.

"Compare Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

"For other statutes dealing with injunctions which are continued, see, e. g.:

"U. S. C., Title 28:

§ 46 (Suits to enjoin orders of Interstate Commerce Commission to be against United States)

§ 47 (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)

§ 378 (Injunctions; when granted)

§ 379 (Injunctions; stay in State courts)

§ 380 (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)

§ 380a (Injunctions; constitutionality of federal statute; application for hearing; appeal to Supreme Court)

"U. S. C., Title 7:

§ 216 (Court proceedings to enforce orders; injunction)

§ 217 (Proceedings for suspension of orders)

"U. S. C., Title 15:

§ 4 (Jurisdiction of courts; duty of district attorney; procedure)

§ 25 (Restraining violations; procedure)

§ 26 (Injunctive relief for private parties; exceptions)

§ 77t(b) (Injunctions and prosecution of offenses)."

NOTES TO DECISIONS

Essentials of Petition.

It is sufficient to allege that statute is unconstitutional as construed and ap-

plied. *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 Sup. Ct. 331.

Failure to allege facts sufficient to constitute a cause of action is not jurisdictional, but may be cured by amendment on motion to dismiss. *Interborough Rapid Transit Co. v. Gilchrist* (D. C.-N. Y.), 25 Fed. (2d) 164. *Revd. on other grounds* 32 Fed. (2d) 1015.

Bill in equity to restrain enforcement of state statute limiting issuance of certificate of convenience and necessity for more than one motor vehicle transportation line over one highway was insufficient to state a cause of action. *Arneson v. Denny* (D. C.-Wash.), 25 Fed. (2d) 988.

Bill by motor-bus corporation against state officer authorized to issue licenses to motor carriers, alleging refusal of the state corporation commission to issue a certificate of convenience and necessity, and seeking to restrain defendant from prosecuting plaintiff for operation of its busses without a license, did not state a cause of action. *Southern Coach Corp. v. Frazier* (D. C.-Va.), 60 Fed. (2d) 594.

Averments that rates imposed on public utility will leave an income equivalent to an annual return of 2.45 per cent on the present fair value of the property, did state a cause of action for preliminary injunction. *Northern Texas Tel. Co. v. Sherman* (D. C.-Tex.), 4 Fed. Supp. 554.

Plaintiff held not to have shown ground for equitable relief. *Melton v. Railroad Comm.* (D. C.-Tex.), 10 Fed. Supp. 984; *Hercules Oil Co. v. Thompson* (D. C.-Tex.), 10 Fed. Supp. 988.

Bill to enjoin enforcement of Washington Industrial Recovery Act was sufficient. *McDermott v. Hamilton* (D. C.-Wash.), 11 Fed. Supp. 235.

The existence of a substantial question as to constitutionality of a state statute, justifying a three-judge court in taking jurisdiction, must be determined from the allegations of the bill. *Liberty Nat. Life Ins. Co. v. Read* (D. C.-Okla.), 24 Fed. Supp. 103.

Form of Orders.

The requirement that the order shall define the injury and state why it is irreparable, applies to suits brought under 8 F. C. A., Title 28, § 380; U. S. C. A., Title 28, § 380; *id.* U. S. C. *Lawrence v. St. Louis-S. F. R. Co.*, 274 U. S. 588, 71 L. ed. 1219, 47 Sup. Ct. 720.

The reasons for issuing the order may be set forth in the opinion of the court. *Lawrence v. St. Louis-S. F. R. Co.*, 274 U. S. 588, 71 L. ed. 1219, 47 Sup. Ct. 720; *Arkansas R. Comm. v. Chicago, R. I. & Pac. R. Co.*, 274 U. S. 597, 71 L. ed. 1224, 47 Sup. Ct. 724.

An order restraining the doing of "any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier" was as definite as it was possible to make it. *Stephens v. Ohio State Tel. Co.* (D. C.-Ohio), 240 Fed. 759.

Injunctive orders criticized as being too broad and general. *King v. Weiss & Lash Mfg. Co.* (C. C. A. 6), 266 Fed. 257; *Davis v. Henry* (C. C. A. 6), 266 Fed. 261.

Terms of injunction against publication of libel held vague and uncertain, in view of 8 F. C. A., Title 28, § 383; U. S. C. A., Title 28, § 383; *id.* U. S. C. *Robert E. Hicks Corp. v. National Salesmans Training Assn., Inc.* (C. C. A. 7), 19 Fed. (2d) 963.

Temporary Restraining Order—Notice—Hearing—Duration [Rule 65 (b)].

The complaint in an action for injunctive relief praying for a preliminary injunction is not subject to dismissal for lack of verification if the prayer for the preliminary injunction is not pressed. However, should the court be asked to grant such interlocutory relief, the plaintiff could not rely upon its unverified complaint, but would be compelled to adduce sworn proof. *Thermex Co. v. Lawson* (D. C.-Ill.), 25 Fed. Supp. 414.

136. Temporary Restraining Order and Rule to Show Cause for Preliminary Injunction.

(Caption.)

It appearing from the verified complaint herein that immediate and irreparable injury, loss, and damage will result to plaintiff before notice can be served and a hearing had on the application for a temporary restraining

order contained in said complaint if defendant [here set out threatened action by defendant]; and it appearing that the said defendant is about to [threatened action by defendant] and will do so unless restrained, and if such acts are committed by defendant, rights may be acquired by parties not subject to process of this court to the irreparable injury of plaintiff (or give other pertinent reason), and in such case any order or judgment which this court may later issue on plaintiff's application for a preliminary injunction or for a permanent injunction will be ineffective, it is,

Ordered, that defendant be and he is hereby ordered to show cause at — M. of the — day of —, 19—, or as soon thereafter as counsel can be heard, why the application for a preliminary injunction contained in the complaint herein should not be granted; and it is further

Ordered, that until and including the — day of —, 19—, or until the further order of this court, defendant —, his agents, servants, employees, attorneys, and all persons in active concert or participation with them, are hereby restrained from [action desired restrained]; provided that plaintiff — first give security in the sum of — dollars (\$—) in the form and manner required by law.

Date—.

United States district judge.

Cross-Reference.

In connection with this chapter, see notes to Form 135.

137. Temporary Restraining Order and Rule to Show Cause for Preliminary Injunction (Alternative Form).

(Caption.)

It appearing from the verified complaint herein that immediate and irreparable injury, loss, and damage will result to plaintiff before notice can be served and a hearing had on the application for a temporary restraining order contained in said complaint if defendant [here set out threatened action by defendant]; and it appearing that the said defendant is about to [threatened action by defendant] and will do so unless restrained, and if such acts are committed by defendant, rights may be acquired by parties not subject to process of this court, to the irreparable injury of plaintiff (or give other pertinent reason), and in such case any judgment which this court may later issue on plaintiff's application for a preliminary injunction or for a permanent injunction will be ineffective, it is

Ordered, that defendant be and he hereby is ordered to show cause at — M. of the — day of —, 19—, or as soon thereafter as counsel can be heard, why a preliminary injunction should not be granted herein, restraining the defendant —, his agents, servants, employees, attorneys, and all persons in active concert or participation with them, from [action desired restrained]; and it is further

Ordered, that until and including the — day of —, 19—, or until the further order of this court, defendant —, his agents, servants, employees, attorneys, and all persons in active concert or participation with them, are hereby restrained from [action desired restrained]; provided that plaintiff — first give security in the sum of — dollars (\$—) in the form and manner required by law.

Date—.

United States district judge.

138. Security for Restraining Order.

(Caption.)

Know all men by these presents, that AB, CD, and EF are held and firmly bound unto GH in the sum of — dollars (\$—), to be paid unto the said GH, his executors, administrators, or assigns, to which payment they bind themselves, their heirs, executors, and administrators, jointly and severally.

Sealed with their seals and dated this — day of —, 19—.

Whereas, the above-named AB has commenced an action against the said GH in the United States District Court for the — District of — and is about to apply for a restraining order as prayed for in the complaint.

Now, therefore, the condition of this obligation is such that if the said AB shall pay such costs and damages as may be adjudged to have been suffered by the said GH, in the event that he is found to have been wrongfully restrained, then this obligation shall be void, otherwise the same shall remain in full force and effect.

Sealed and delivered in

the presence of:

_____[SEAL]

_____[SEAL]

_____[SEAL]

STATE OF —, }
COUNTY OF —. } ss:

CD and EF, being first severally duly sworn, each for himself, says that he is a resident and freeholder within the state of —, and that he is worth the sum of — dollars (\$—), over and above all his just debts and liabilities, which he owes or has incurred, and in property not exempt from execution.

CD.

EF.

Subscribed and sworn to before me this — day of —, 19—.

Name.

Official character.

Approved this — day of —, 19—.

United States district judge.

Federal Rules of Civil Procedure.

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof." Rule 65 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 65 (c): "Except for the last sentence, this is substantially U. S. C., Title 28, § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which ex-

pressly except the United States or an officer or agency thereof from such security requirements:

"U. S. C., Title 15, §§ 77t (b), 78u (e), and 79r (f) (Securities and Exchange Commission)

It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

"See U. S. C., Title 6 (Official and Penal Bonds) for bonds by surety companies."

NOTES TO DECISIONS

Security [Rule 65 (c)].

A complaint containing a prayer for a preliminary injunction need not be dismissed on the ground that no indemnity bond has been given. This is not required until the preliminary injunction is ready to be granted. *Thermex Co. v. Lawson* (D. C.-Ill.), 25 Fed. Supp. 414.

Issuance of a preliminary injunction should be conditioned upon the deposit of security in a specified sum for the payment of such costs and damages as may be sustained by the party enjoined, if he is found to have been wrongfully enjoined. *Penmac Corp. v. Falcon Pencil Corp.* (D. C.-N. Y.), 28 Fed. Supp. 639.

139. Temporary Restraining Order Granted without Notice.

(Caption.)

The plaintiff having applied for a temporary restraining order and it appearing to the court from the verified complaint (or affidavit) filed herein that immediate and irreparable injury (loss) (damage) will result to the plaintiff before notice can be served and a hearing had on plaintiff's prayer for injunction; that such injury (loss) (damage) would consist of [here define the injury]; that such injury (loss) (damage) would be irreparable because [here state why it would be irreparable]; that it is not practicable to give notice because [here state reason]; and that plaintiff has furnished sufficient security for the payment of such costs

and damages as may be incurred by any party found to have been wrongfully enjoined hereby, it is on motion of — attorney for the plaintiff,

Ordered, that defendant be and is hereby restrained until — — M. of the — day of —, 19—, from [here state acts or action to be restrained].

Date—.

United States district judge.

140. Motion for Preliminary Injunction.

(Caption.)

Plaintiff — moves the court for a preliminary injunction in the above-entitled cause, enjoining the defendant, his agents, servants, employees, attorneys, and all persons in active concert or participation with them, pending the final hearing and determination of this cause, from [action desired enjoined].

The grounds in support of this motion are as follows:

1. Unless restrained the defendant will immediately [threatened action by defendant];
2. Immediate and irreparable injury, loss, and damage will result to plaintiff by reason of [threatened action by defendant] as more particularly set forth in the verified complaint filed herein;
3. If defendant [threatened action by defendant], any judgment which this court may later render on final determination of this cause will be ineffective;
4. If this preliminary injunction be granted, the injury, if any, to defendant herein, if final judgment be in his favor, will be inconsiderable and will be adequately indemnified by bond.

Attorney for plaintiff.

Address.

Cross-Reference.

For notes concerning pleading generally, see Form 56.

141. Notice of Motion for Preliminary Injunction.

(Caption.)

To—
Attorney for defendant.

Address.

Please take notice that the undersigned will bring the attached motion for a preliminary injunction on for hearing before this court at Room

No. — [name and location of building] on the — day of —, 19—,
at — —. M. of that day or as soon thereafter as counsel can be heard.

Date—.

Attorney for plaintiff.

Address.

142. Order Denying Motion for Preliminary Injunction.

(Caption.)

This cause came on for hearing on plaintiff's motion for preliminary injunction and upon consideration thereof and of the pleadings and affidavits filed herein and of arguments of counsel for the respective parties, it is,

Ordered, that said motion be and the same hereby is denied.

Date—.

United States district judge.

Cross-Reference.

Order denying application for preliminary injunction and dismissing action, Form 542.

143. Notice of Motion to Vacate or Modify Preliminary Injunction.

(Caption.)

To—

Attorney for plaintiff.

Address.

Please take notice that the undersigned will bring the attached motion to vacate or modify the preliminary injunction on for hearing before this court at Room No. — [name and location of building] on the — day of —, 19—, at — —. M. of that day or as soon thereafter as counsel can be heard.

Attorney for defendant.

Date—.

Address.

144. Order Restoring Preliminary Injunction Pending Appeal.

(Caption.)

This cause having been heard on defendant's motion to dismiss the amended complaint herein, and the said motion having been granted and the complaint having been dismissed, and the preliminary injunction heretofore entered having been dissolved and judgment entered and plaintiff having noted an appeal from such judgment, thereupon, in open court, the plaintiff moved the court to restore the preliminary injunction during

the pendency of the appeal and the defendants having represented that said injunction should be modified, it is,

Ordered, that during pendency of said appeal, the defendant —, his agents, servants, employees, attorneys, and all persons in active concert or participation with them, be and they hereby are restrained from [action desired restrained in modified form].

Date—.

United States district judge.

145. Order Denying Motion to Set Aside Judgment for Injunction.

(Caption.)

This cause came on to be heard upon the application of the defendant —, that the court reconsider its judgment entered herein on the — day of —, 19—, in the light of [here insert grounds urged] and set aside and vacate said judgment. The cause was argued by counsel and upon consideration thereof;

It is ordered, adjudged, and decreed, That the application to set aside and vacate the judgment for injunction entered and filed herein on the — day of —, 19—, be, and it is hereby denied.

Date—.

United States district judge.

146. Final Order Denying Injunction and Dismissing Complaint.

(Caption.)

This cause came on to be heard on its merits. Testimony was taken, exhibits were offered and the case was argued by counsel. Upon consideration of the entire case, it is

Ordered, adjudged and decreed:

1. That the plaintiff be and it is hereby denied any temporary or permanent injunctive relief of any kind, nature, or description.
2. That all temporary restraining orders and preliminary injunctions heretofore issued herein be, and the same are, hereby vacated and set aside.
3. That the plaintiff's complaint herein be, and the same is, hereby dismissed on the merits.
4. That the costs herein be taxed against the plaintiff.

Date—.

United States district judge.

147. Restraining Provisions for Inclusion in Injunction.

(1) PATENT INFRINGEMENT

That the defendant, his agents, and servants are hereby restrained and enjoined from manufacturing, using, and selling any [here name type of

article] embodying the invention or inventions claimed in said letters patent.

(2) TRADE-MARK INFRINGEMENT

That the defendant, his agents, and servants are hereby restrained and enjoined from employing, using, or displaying the aforesaid trade-mark or any variation thereof upon or in connection with any [here name type of article].

(3) COPYRIGHT INFRINGEMENT

That the defendant, his agents, and servants are hereby restrained and enjoined from printing, publishing, or selling or causing to be printed, published, or sold, or participating in any way in the printing, publication, or sale of any copy or copies or any part thereof of the publication entitled "——."

(4) UNFAIR COMPETITION

That the defendant, his agents, and servants are hereby restrained and enjoined from advertising, selling, or offering for sale any [here name type of article] by or under the name of "——," or any imitation thereof; or using any packages or containers bearing said name or any imitation thereof, or designed or colored in imitation of or similar to packages and containers employed by plaintiff.

(5) NEGATIVE COVENANT IN CONTRACT FOR SERVICES

That the defendant CD is hereby restrained and enjoined from singing or performing or participating in any musical or theatrical performance at any public place until —— —, 19—, except at the place or places and on the occasions referred to in the contract hereinabove described.

(6) NEGATIVE COVENANT RUNNING WITH THE LAND

That the defendant CD, his agents, and servants are hereby restrained and enjoined from maintaining, conducting, or operating on said premises any business, industrial, or commercial establishment whatsoever, or permitting any other person to maintain, conduct, or operate the same, or from using the said premises for any purpose whatsoever except as a dwelling-house.

(7) NUISANCE

That the defendant, his agents, and servants are hereby restrained and enjoined from maintaining a slaughter-house on the premises herein described or permitting the said premises to be used for such purpose.

(8) PROSECUTION OF ANOTHER SUIT

That the defendant, his agents, and servants are hereby restrained and enjoined from prosecuting or taking any further step in the action entitled, "AB, plaintiff, against CD, defendant," and pending in — Court, or from commencing and instituting any other similar proceeding on the cause of action referred to in the complaint in said action.

(9) ULTRA VIRES TRANSACTION

That the defendant XY Corporation and the defendants AB, CD, and EF, their agents, and servants are hereby restrained and enjoined from continuing to perform the contract hereinabove described, or from using or permitting the use of any funds or other assets of said XY Corporation for or in connection therewith.

CHAPTER 6

RECEIVERS

Form	Form
160. Notice of motion for appointment of receiver.	166. Motion for appointment of attorney for receivers.
161. Motion for appointment of receiver for mortgaged property.	167. Order appointing attorney for receivers.
162. Order appointing receiver in ex parte proceeding.	168. Order making allowances in receivership.
163. Order appointing receiver for corporation.	169. Motion by receiver for final discharge.
164. Order appointing receiver in adversary proceeding.	170. Order allowing final account and discharging receiver.
165. Order appointing receiver to collect rents.	

INTRODUCTION.—No change in receivership practice was introduced by the new rules. The former procedure is expressly continued in that regard by Rule 66, the sole exception being that appeals in receivership proceedings are to be governed by the new rules.

The federal courts are responsible for the development and the extensive use of equity receiverships of corporations in connection with creditors' bills. A bill of complaint by a simple contract creditor of a corporation, alleging that the defendant corporation is unable to meet its debts as they mature and praying for the appointment of receivers to conserve its assets for the benefit of all of its creditors, filed simultaneously with an answer admitting the allegations of the bill and joining in its prayer, and followed immediately by the making of an ex parte order appointing receivers to conserve the assets and to conduct the corporate business under the protection and supervision of the court, is a device which flourished in the federal courts and was employed practically as a substitute for bankruptcy in connection with insolvent railroads and public utilities, as well as large commercial and industrial corporations. Some of these concerns were expressly excluded from the terms of the Bankruptcy Act. In other instances, bankruptcy procedure was too rigid to be suitable to the requirements of a large business which did not require liquidation.

This expedient, however, has become obsolescent, if not entirely obsolete, as a result of the enactment of sections 77 and 77B of the Bankruptcy Act (amended by the Chandler Act of 1938) which permitted the reorganization of railroads and other corporations to be effected in the Bankruptcy Court. These enactments did away with the necessity of resorting to an artificial, one may almost say fictitious, controversy as a means to invoke the aid of the court to conserve the assets of insolvent corporations.

Needless to say, the other uses of receiverships remain as heretofore. They constitute a useful instrument for the purpose of temporarily placing property in custodia legis, as for example in connection with foreclosure suits, partnership accountings, or proceedings by judgment creditors.

160. Notice of Motion for Appointment of Receiver.

(Caption.)

To _____

Attorney for defendant.

Address.

Please take notice that this cause will be brought on for hearing on plaintiff's motion for the appointment of a receiver herein before this court at _____ on the _____ day of _____, 19____, at _____ M. of that day or as soon thereafter as counsel can be heard.

Attorney for plaintiff.

Date_____.

Address.

Statutory References.

Management of property by receivers, 7 F. C. A., Title 28, § 124; U. S. C. A., Title 28, § 124; id. U. S. C.

Suits against receivers, 7 F. C. A., Title 28, § 125; U. S. C. A., Title 28, § 125; id. U. S. C.

Federal Rules of Civil Procedure.

"The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules." Rule 66.

NOTES TO DECISIONS

In General.

The provision of Rule 66 that the practice in the administration of estates by receivers appointed by the court shall be in accordance with the practice prevail-

ing in federal courts, prior to the new rules, relates only to receivers appointed by federal courts. *Bicknell v. Lloyd-Smith* (C. C. A. 2), 109 Fed. (2d) 527, revg. 29 Fed. Supp. 929.

161. Motion for Appointment of Receiver for Mortgaged Property.

(Caption.)

Plaintiff moves the court for the appointment of a receiver herein to take possession of and manage the mortgaged property described in the

complaint, to collect the rents and profits thereof, and to act with respect thereto as this court may direct.

Attorney for plaintiff.

Cross-Reference.

In connection with this chapter, see notes to Form 160.

162. Order Appointing Receiver in Ex Parte Proceeding.

(Caption.)

This cause came on for hearing on plaintiff's motion for appointment of a receiver and after hearing counsel and the court being fully advised in the premises, it is,

Ordered that John Doe of —, —, be and he hereby is appointed receiver of all of the property of the defendant corporation, and that the said John Doe be and he hereby is directed to take immediate possession of all of said property and to manage and conduct the business of the defendant until the further order of this court.

Date—.

United States district judge.

163. Order Appointing Receiver for Corporation.

(Caption.)

This cause came on for hearing on plaintiff's motion for the appointment of a receiver herein and upon consideration of the pleadings and the affidavits and exhibits in support thereof and after hearing counsel for both parties, it is,

Ordered, that AB of — and CD of — be and they are hereby appointed receivers of all of the property of the — Corporation; and it is further

Ordered, that the said receivers are hereby authorized and directed to take immediate possession of all of the said property, to hold the same as officers of and under the direction of this court and to continue the operation of the business of said corporation; and it is further

Ordered, that the officers, directors, agents, and employees of the said — Corporation are hereby directed forthwith, upon demand of the said receivers to deliver to them possession of all of said property; and it is further

Ordered, that said receivers are hereby authorized to institute and prosecute all necessary legal proceedings as such receivers and to appear and conduct the prosecution of any pending actions on behalf of the — Corporation.

All persons are hereby enjoined from instituting or further prosecuting any legal proceeding against the — Corporation or any of its property.

The officers, directors, agents, and employees of the said corporation are hereby enjoined from interfering with or disposing of the property of the ——— Corporation.

Each of the said receivers shall within ten days from the date of this order file herein a bond in the penal sum of ——— dollars (\$——) with surety or sureties approved by this court conditioned on his accounting for all money and property coming into his hands as such receiver and otherwise faithfully discharging the duties of his office.

Date——.

United States district judge.

164. Order Appointing Receiver in Adversary Proceeding.

(Caption.)

This cause came on to be heard on the complaint, the motion for the appointment of a receiver and the affidavits in support thereof, and in opposition thereto, and after argument of counsel it is

Ordered, that AB of ——— be and he is hereby appointed receiver of the defendant, the ——— Company, and of all of its property with full power and authority to collect and reduce to possession all of said property; and it is further

Ordered, that the ——— Company, its officers, directors, stockholders, agents, and employees, and all other persons having property of the said corporation in their possession or control, are hereby ordered to turn over to the said AB as such receiver all property belonging to said corporation in their possession or under their control; and it is further

Ordered that before entering upon his duties as receiver, the said AB shall give bond with surety or sureties to be approved by the court in the penal sum of ——— dollars (\$——) for the faithful performance of his duties as such.

Date——.

United States district judge.

165. Order Appointing Receiver to Collect Rents.

(Caption.)

This cause came on for hearing on plaintiff's motion for the appointment of a receiver of the property involved herein and the court being advised in the premises, it is

Ordered, that ——— of ——— be and he is hereby appointed receiver of said property, being [legal description of the property], to take possession thereof, to manage and rent the same, and to collect the rents therefor; and it is further

Ordered, that the said receiver execute and file herein a bond in the amount of ——— dollars (\$——) conditioned on his accounting for all money

coming into his hands as such receiver, and otherwise faithfully discharging the other duties of his office.

Date——.

United States district judge.

166. Motion for Appointment of Attorney for Receivers.

(Caption.)

AB and CD, receivers herein appointed by order of court dated ——, 19——, move the court for the appointment of John Doe, Esquire, of ——, ——, as attorney for said receivers on the grounds that [state need for services and fitness and qualifications of Doe for appointment].

AB.

CD.

167. Order Appointing Attorney for Receivers.

(Caption.)

This cause came on for hearing on motion of the receivers herein for the appointment of an attorney for the said receivers and the court being fully advised in the premises, it is

Ordered, that John Doe of ——, —— be and he is hereby appointed attorney for the receivers herein.

Date——.

United States district judge.

168. Order Making Allowances in Receivership.

(Caption.)

This cause came on for hearing on motion of the receivers herein for the allowance of fees and compensation for services and the court being fully advised in the premises, it is

Ordered, the compensation for services rendered herein to date be and it is hereby allowed as follows:

AB, a receiver, having heretofore been paid by order of this court the sum of —— dollars (\$——), is allowed the further sum of —— dollars (\$——).

CD, a receiver, having heretofore been paid by order of this court the sum of —— dollars (\$——), is allowed the further sum of —— dollars (\$——).

EF, attorney for the receivers, having heretofore been paid by order of this court the sum of —— dollars (\$——), is allowed the further sum of —— dollars (\$——).

GH, attorney for plaintiffs, having heretofore been paid by order of this court the sum of — dollars (\$—), is allowed the further sum of — dollars (\$—).

Date—.

United States district judge.

169. Motion by Receiver for Final Discharge.

(Caption.)

AB, receiver herein, presents herewith his final account showing that he has fully accounted for all monies and other property that came into his hands as receiver and moves the court for an order approving said account, granting his discharge, and releasing the sureties on his bond as receiver.

Receiver.

170. Order Allowing Final Account and Discharging Receiver.

(Caption.)

This cause came on for hearing on motion of the receiver herein for allowance of his accounts and for his discharge and the accounts of said receiver having been filed and found to be correct, it is

Ordered, that the accounts of —, receiver herein be and the same are hereby approved; and it is further

Ordered, that said — be and he is hereby discharged as receiver herein; and the sureties on his official bond, as receiver, are hereby released and discharged.

Date—.

United States district judge.

CHAPTER 7

NE EXEAT

Form

180. Motion for writ of ne exeat.

181. Affidavit in support of a writ of
ne exeat.

Form

182. Order for writ of ne exeat.

183. Writ of ne exeat.

INTRODUCTION.—“Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States,” 8 F. C. A., Title 28, § 376; U. S. C. A., Title 28, § 376; *id.* U. S. C.

180. Motion for Writ of Ne Exeat.

(Caption.)

Plaintiff moves the court for a writ of ne exeat against defendant herein on the ground that, plaintiff has commenced an action for equitable relief against the defendant, defendant designs quickly to depart from the United States, and defendant's departure from the United States will prevent recovery by plaintiff of the relief sought by this action unless the writ of ne exeat hereby requested is issued forthwith.

Attorney for plaintiff.

Address.

Federal Rules of Civil Procedure.

“At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall

be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.” Rule 64.

NOTE OF ADVISORY COMMITTEE TO RULE 64: “This rule adopts the existing federal law, except that it specifies the applicable state law to be that of the time when the remedy is sought. Under

U. S. C., Title 28, § 726 (Attachments as provided by state laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable state law, and the district courts might, from time to time, by general rules, adopt such state laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

"Lis pendens. No rule concerning lis pendens is stated, for this would appear to be a matter of substantive law affecting state laws of property. It has been held that in the absence of a state statute expressly providing for the recordation of notice of the pendency of federal actions, the commencement of a federal action is notice to all persons affected. *King v. Davis*, 137 Fed. 198. It has been held, however, that when a state statute does so provide expressly, its provisions are binding. *United States v. Calcasieu Timber Co.*, 236 Fed. 196.

"For statutes of the United States on attachment, see, e. g.:

"U. S. C., Title 28:

- § 737 (Attachment in postal suits)
- § 738 (Attachment; application for warrant)
- § 739 (Attachment; issue of warrant)
- § 740 (Attachment; trial of ownership of property)
- § 741 (Attachment; investment of proceeds of attached property)
- § 742 (Attachment; publication of attachment)
- § 743 (Attachment; personal notice of attachment)
- § 744 (Attachment; discharge; bond)
- § 745 (Attachment; accrued rights not affected)

- § 746 (Attachments dissolved in conformity with State laws)

"For statutes of the United States on garnishment, see, e. g.:

"U. S. C., Title 28:

- § 748 (Garnishees in suits by United States against a corporation)
- § 749 (Same; issue tendered on denial of indebtedness)
- § 750 (Same; garnishee failing to appear)

"For statutes of the United States on arrest, see, e. g.:

"U. S. C., Title 28:

- § 376 (Writs of ne exeat)
- § 755 (Special bail in suits for duties and penalties)
- § 756 (Defendant giving bail in one district and committed in another)
- § 757 (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)
- § 758 (Bail and affidavits; taking by commissioners)
- § 759 (Calling of bail in Kentucky)
- § 760 (Clerks may take bail de bene esse)
- § 843 (Imprisonment for debt)
- § 844 (Imprisonment for debt; discharge according to State laws)
- § 845 (Imprisonment for debt; jail limits)

"For statutes of the United States on replevin, see, e. g.:

"U. S. C., Title 28:

- § 747 (Replevy of property taken under revenue laws)."

NOTES TO DECISIONS

Nature and Purpose of Writ.

Ne exeat is a temporary and provisional remedy. It is not intended to operate as a life-long restraint upon defendant's freedom of motion. The writ should not be granted unless it appears from satisfactory proof that defendant designs quickly to depart from the United States. *Shainwald v. Lewis* (D. C.-Cal.), 46 Fed. 839.

Seizure of Person or Property [Rule 64].

A trustee in bankruptcy may not invoke state execution statutes to require the bankrupt to make payments to him out of income from a trust estate. *Thummess v. Von Hoffman* (C. C. A. 3), 109 Fed. (2d) 293.

This rule does not enlarge the power of a referee in bankruptcy. *Thummess v. Von Hoffman* (C. C. A. 3), 109 Fed. (2d) 293.

181. Affidavit in Support of a Writ of Ne Exeat.

(Caption.)

STATE OF _____, }
 COUNTY OF _____, } ss:

AB, being first duly sworn, says

1. That he is plaintiff in this action.
2. That he has commenced an action for equitable relief against — defendant herein, by the filing of a complaint on the — day of —, 19—, a copy of which is annexed hereto as "Exhibit A."
3. That defendant designs quickly to depart from the United States as shown by [any detailed statement of fact within knowledge of affiant].
4. That defendant's departure from the United States will prevent recovery by plaintiff of the relief sought by this action.

 AB.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

 Name.

 Official character.

Cross-Reference.

In connection with this chapter, see notes to Rule 180.

182. Order for Writ of Ne Exeat.

(Caption.)

This cause came on for hearing on motion of plaintiff for a writ of ne exeat and it appearing from the complaint herein and plaintiff's affidavit in support of said motion, verified on the — day of —, 19—, that plaintiff has commenced an action for equitable relief against the defendant, and that the defendant designs quickly to depart from the United States and plaintiff having filed a bond in the sum of — dollars (\$—) conditioned on the payment by him of any damages which may be adjudged against him as the result of the issuance of the said writ, it is

Ordered, that a writ of ne exeat republica of the United States of America issue out of and under the seal of this court to restrain the said — from departing out of the jurisdiction of this court until the satisfaction of any judgment which may be entered herein or the further order of the court, and requiring him to give security in the sum of — dollars (\$—) to comply with the provisions of such writ.

Date—.

 United States district judge.

Source of Form.

Lewis v. Shainwald (C. C.-Cal.), 48
 Fed. 492.

183. Writ of Ne Exeat.

District Court of the United States

_____ District of _____

The President of the United States of America

To the United States marshal for the _____ District of _____.

Whereas, it is represented to this court that an action for equitable relief has been commenced by AB, plaintiff against CD, defendant, that the defendant designs quickly to depart from the United States, which tends to the great prejudice and damage of the said plaintiff,

Therefore, we hereby command you that, without delay, you cause the said CD to come before you and give sufficient security in the sum of _____ dollars (\$_____), that the said CD will not go or attempt to go out of the jurisdiction of this court until the satisfaction of any judgment which may be entered herein or the further order of the court; and in case the said CD shall refuse to give such security, then you are to commit him to jail, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to this court, together with this writ.

(Add teste.)

Source of Form.

Griswold v. Hazard, 141 U. S. 260, 35
L. ed. 678, 11 Sup. Ct. 972, 999.

CHAPTER 8

REMOVAL OF CAUSES

Form

- | | |
|---|---------------------------------------|
| 190. Notice to adverse party. | 194. Motion to remand removed cause. |
| 191. Petition for removal—Diversity of citizenship. | 195. Notice of motion to remand. |
| 192. Order of removal. | 196. Order denying motion to remand. |
| 193. Removal bond. | 197. Order granting motion to remand. |

INTRODUCTION.—The Federal Rules of Civil Procedure apply to actions removed from a state to a federal court. The parties need not, however, file new pleadings after removal, unless the court so orders.

190. Notice to Adverse Party.

(Caption.)

To AB, plaintiff in the above-entitled cause.

You are hereby notified that CD, the defendant in the above-entitled cause, will, on the — day of —, 19—, file in said cause his petition for removal of said cause to the United States District Court for the — District of —, — Division together with his bond, a copy of each of said petition and bond being attached hereto.

Address

Statutory Reference.

Notice required, 7 F. C. A., Title 28, § 72; U. S. C. A., Title 28, § 72; id. U. S. C.

NOTES TO DECISIONS

Notice, Form, and Requirements.

It is not necessary that the notice should state the time and place where the petition and bond would be presented. *Potter v. General Baking Co.* (D. C.-R. I.), 213 Fed. 697.

Notice that petition and bond would be filed on or before a day named was not fatally defective for uncertainty. *Cropsey v. Sun Printing & Pub. Assn.* (D. C.-N. J.), 215 Fed. 132.

Notice of intention to file a petition and bond for removal of a cause is sufficient though it does not specify the time and place where it is to be presented.

Hinman v. Barrett (D. C.-N. Y.), 244 Fed. 621.

The duty of the state court to "accept" the petition and bond is a duty to "grant" the removal, and the notice of intention to remove must state the time when and place where the petition and bond will be presented, so that the opposing party may show any grounds he may have as to why a removal is improper, thus a notice that the petition and bond will be filed with the clerk at a specified time is insufficient. *Lee v. Continental Ins. Co.* (D. C.-Ky.), 292 Fed. 408.

Clerical error as to date in notice was not ground for remand. *Kidd v. National Fire Ins. Co.* (D. C.-Va.), 32 Fed. (2d) 935.

It is notice of the bond and petition that is required, and not notice of a hear-

ing thereon and the omission to allege in the petition that the notice was given does not invalidate the petition. *Ritchey Lithographing Corp. v. Robertson-Cole Distributing Corp.*, 199 App. Div. 362, 191 N. Y. S. 870.

191. Petition for Removal—Diversity of Citizenship.

(Caption.)

The undersigned petitioner respectfully shows that he is the defendant in the above-entitled action now pending in the Circuit Court of the county of —, state of —; that petitioner, as such defendant, is required to appear and plead to plaintiff's complaint on the — day of —, 19—; that the cause of action stated in plaintiff's complaint is for [here state briefly character of the action], and wherein plaintiff has demanded damages against defendant in the sum of — dollars (\$—).

Petitioner shows that the amount in controversy in said cause of action exceeds the sum of three thousand dollars (\$3,000) exclusive of interest and costs as in plaintiff's complaint is alleged.

Petitioner further shows that the plaintiff at the time of the beginning of said action, and ever since has been and still is a citizen of the state of —; that petitioner, defendant, at the time of the beginning of said action, ever since has been and still is a citizen of the state of —; that the controversy in said cause of action is entirely between citizens of different states; that petitioner desires to remove said cause from said state court to the United States District Court for the — District of —.

Petitioner files herewith and presents to this court his bond in the penal sum of — dollars (\$—), with RS and ST as sureties thereon, and prays that the same may be accepted and approved by this court and that said action may be removed to the said United States District Court for the — District of —, — Division.

Defendant.

STATE OF —, }
COUNTY OF —. } ss:

CD, being duly sworn, says that the matters set forth in the foregoing petition are true.

CD.

Subscribed and sworn to before me this — day of —, 19—.

Name.

[SEAL]

Official character.

Note.

Use similar petition, except as to facts, for removal for any other grounds specified in 7 F. C. A., Title 28, §§ 71, 73, or 74; U. S. C. A., Title 28, §§ 71, 73, or 74; id. U. S. C.

Cross-Reference.

Habeas corpus in removal cases, Form 623, and notes thereto.

Statutory References.

Grounds for removal in general, 7 F. C. A., Title 28, § 71; U. S. C. A., Title 28, § 71; id. U. S. C.

Habeas corpus to release defendant after removal of suit, 7 F. C. A., Title 28, § 75; U. S. C. A., Title 28, § 75; id. U. S. C.

Removal of suits denying civil rights, 7 F. C. A., Title 28, § 74; U. S. C. A., Title 28, § 74; id. U. S. C.

Removal of suits or prosecutions against revenue officers, 7 F. C. A., Title 28, § 76; U. S. C. A., Title 28, § 76; id. U. S. C.

Suits by aliens, removal, 7 F. C. A., Title 28, § 77; U. S. C. A., Title 28, § 77; id. U. S. C.

Suits on land grants from states, 7 F. C. A., Title 28, § 73; U. S. C. A., Title 28, § 73; id. U. S. C.

"Whenever any party entitled to remove any suit mentioned in section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a

petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court." Judicial Code, § 29; 7 F. C. A., Title 28, § 72; U. S. C. A., Title 28, § 72; id. U. S. C.

NOTES TO DECISIONS**In General.**

Petition must conform to requirements of law. In re Case of Sewing Mach. Cos., 18 Wall. (85 U. S.) 553, 21 L. ed. 914.

As to contents of petition where removal is sought in case of fraudulent joinder of resident codefendant to prevent removal. Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. ed. 144, 42 Sup. Ct. 35. See also Towill v. Southern R. Co., 121 S. Car. 447, 114 S. E. 416.

Under the Act of 1875, a cause was removable where the whole record showed federal jurisdiction, no matter how irregular the petition might be.

Ruckman v. Ruckman (C. C.-N. J.), 1 Fed. 587.

Averment of citizenship of executors was sufficient. Cooke v. Seligman (C. C.-N. Y.), 7 Fed. 263.

It is necessary to allege that all the defendant partners are of different citizenship from plaintiff. Smith v. Horton (C. C.-N.Y.), 7 Fed. 270.

Petition and bond are essential and cause can not be removed by consent of parties. First Nat. Bank v. Prager (C. C. A. 4), 91 Fed. 689.

Proper procedure for removal is to file petition and bond. Bryant Bros. Co. v. Robinson (C. C. A. 5), 149 Fed. 321.

Where plaintiff colorably pleads a non-removable case with fraudulent purpose of defeating removal, the defendant, seeking removal, must set up the facts of such fraudulent purpose in his removal petition. *Frazier v. Hines* (D. C.-S. Car.), 260 Fed. 874.

Averments that corporation was organized in named state was sufficient allegation that it was a citizen of that state. *Duvall v. Wabash R. Co.* (D. C.-Mo.), 9 Fed. (2d) 83.

Petition for removal must allege that time to answer or otherwise plead has not expired. *Mannion v. United States Shipping Bd. Emergency Fleet Corp.* (C. C. A. 2), 9 Fed. (2d) 894.

The jurisdictional amount may be pleaded in a petition for removal. *Lever Bros. Co. v. J. Eavenson & Sons, Inc.* (D. C.-N. Y.), 7 Fed. Supp. 679; *Thorkelson v. Aetna Life Ins. Co.*, (D. C.-Minn.), 9 Fed. Supp. 570.

The petition need not state facts which appear of record. *Miller v. Buyer*, 82 Colo. 474, 261 Pac. 659.

A mere general averment in a petition for removal that the joinder of a resident defendant is fraudulent is not binding on the state court unless it appears from the petition, in connection with plaintiff's pleading, that the joinder is fraudulent as a matter of law. *Thompson v. Pan American Petroleum Corp.*, 46 Ga. App. 791, 169 S. E. 270.

Petition was insufficient to show right of removal for diversity of citizenship on ground that resident codefendant was fraudulently joined. *McNulty v. Atlas Portland Cement Co.* (Mo. App.), 249 S. W. 730.

Petition not required to allege non-expiration of time to answer or plead in state court. *Ritchey Lithographing Corp. v. Robertson-Cole Distributing Corp.*, 199 App. Div. 362, 191 N. Y. S. 870.

Diversity of Citizenship.

Petition to remove must contain proper averments as to citizenship, and "citizen" and "resident" are not synonymous. *Parker v. Overman*, 18 How. (59 U. S.) 137, 15 L. ed. 318. See also *Reckling v. McKinstry* (C. C.-S. Car.), 185 Fed. 842.

It is not necessary for petition to aver diversity of citizenship if such fact is shown by the record. *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447.

Pleading showing place of residence but not citizenship was insufficient to

show diversity of citizenship. *Kelly v. Houghton* (C. C.-Cal.), 23 Fed. 417.

Sufficiency of allegation of nonresidence of defendant in petition for removal. *Fife v. Whittell* (C. C.-Cal.), 102 Fed. 537; *Zebert v. Hunt* (C. C.-Ind.), 108 Fed. 449.

Allegation that defendant is a resident of another state is not a sufficient allegation that he is not a resident of the state where suit was brought. *De La Montanya v. De La Montanya* (D. C.-Cal.), 158 Fed. 117.

As corporation is not a citizen, allegation that it is a citizen and resident of a certain state is insufficient, but defect may be cured by amendment at any time before final disposition in trial court. *Wells v. Russellville Anthracite Coal Min. Co.* (D. C.-Ark.), 206 Fed. 528.

"Being nonresident of that state," sufficiency of allegations of residence. *Miller v. Soule* (D. C.-Pa.), 221 Fed. 493.

Action between citizens of different states is removable by defendant to federal court of district in which suit is pending, and an allegation that the citizenship of the parties is diverse is sufficient without an allegation plaintiff is resident of district in which suit was filed as 7 F. C. A., Title 28, § 112; U. S. C. A., Title 28, § 112; *id.* U. S. C. does not apply in such instance. *Robinson v. Attapulugus Clay Co.*, 55 Ga. App. 141, 189 S. E. 555.

—Parties.

In a single controversy, all parties defendant must unite in petition for removal. *Smith v. McKay* (C. C.-Mich.), 4 Fed. 353; *Yarnell v. Felton* (D. C.-Tenn.), 102 Fed. 369, 104 Fed. 161; *Lomax v. Foster Lbr. Co.* (C. C. A. 5), 174 Fed. 959; *Painter v. Chicago, B. & Q. R. Co.* (C. C.-Nebr.), 177 Fed. 517. But compare *Garner v. Second Nat. Bank* (C. C.-N. Y.), 66 Fed. 369; *Hunter v. Conrad* (C. C.-R. I.), 85 Fed. 803.

Where cause of action against two defendants who were nonresidents was joint, and one of the defendants had not been served, it was unnecessary for both to join in petition for removal. *Phillips v. Manufacturers Trust Co.* (C. C. A. 9), 101 Fed. (2d) 723.

Removal of Suits and Prosecutions Against Revenue Officers.

7 F. C. A., Title 28, § 76; U. S. C. A., Title 28, § 76; *id.* U. S. C. applies to both civil and criminal cases, and includes

any case that comes within its terms, without reference to the amount in dispute, if the suit be of a civil nature. *Whelan v. New York, L. E. & W. R. Co. (C. C.-Ohio)*, 35 Fed. 849.

Where complaint did not show that the act complained of was done by an officer of the United States in his official capacity, cause was not removable. *Mayo v. Dockery (C. C.-N. Car.)*, 108 Fed. 897.

Petition for removal of criminal prosecution begun in state court against a revenue inspector was sufficient. *Alabama v. Peak (D. C.-Ala.)*, 252 Fed. 306.

Petition for removal held sufficient. *Oregon v. Wood (D. C.-Ore.)*, 268 Fed. 975.

Amended petition of revenue officers charged with murder was sufficient. *Maryland v. Ford (D. C.-Md.)*, 12 Fed. (2d) 289.

Petition for removal showing that defendant, a prohibition agent, went to a farm to make a seizure of liquors, and that prosecution under the state law arose out of such act, showed grounds for removal. *Rhode Island v. Richardson (D. C.-R. I.)*, 32 Fed. (2d) 301.

Diversity of citizenship is immaterial, and filing of petition and bond is not required. *Horne v. Aderhold (D. C.-Ga.)*, 1 Fed. Supp. 690.

Petition negating the possibility that investigator in the alcohol tax unit was engaged in other than official acts at time of alleged murder and alleged assault to murder was sufficient. *Tennessee v. Keenan (D. C.-Tenn.)*, 13 Fed. Supp. 784.

Separable Controversy.

To remove actions of tort on grounds of separable controversy, such controversy must appear on face of plaintiff's pleading. *Gableman v. Peoria, D. & E. R. Co.*, 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. 171.

"By reason of all said negligent acts deceased was killed," sufficiently charged joint and concurrent negligence. *Beckwith v. Chicago, M. & St. P. R. Co. (D. C.-Wash.)*, 223 Fed. 858.

Separable character must appear from the allegations of the petition irrespective of the answer or answers. *King v. Beaumont (D. C.-Tex.)*, 296 Fed. 531.

—Parties.

Where there is a separable controversy, it is not necessary that all defendants to the controversy join in the

petition. *Buck v. Felder (D. C.-Tenn.)*, 196 Fed. 419.

Averments in petition for removal held to present a case of separable controversy. *Schotis v. North Coast Stevedoring Co. (D. C.-Wash.)*, 24 Fed. (2d) 591.

Averment that loss was due to the fault of one of the defendants or to one or more of them acting in concert or to the concurrent negligence of all of them, did not show a separable controversy. *Best Foods, Inc. v. Mitsubishi Shoji Kaisha, Ltd. (D. C.-N. Y.)*, 39 Fed. (2d) 619.

Whether an action against insured and an insurer for injuries arising from the operation of an automobile presents a separable controversy depends upon plaintiff's pleadings, and there is no separable controversy where the averment is that insurer issued a liability policy for the benefit of any person injured by the automobile. *Haenni v. Craven (D. C.-Tex.)*, 56 Fed. (2d) 261; *Cothran v. Hackel (D. C.-Tex.)*, 56 Fed. (2d) 263.

The facts in the complaint, not the legal conclusions drawn from those facts, nor the pleader's averments of joint liability, nor his prayer if it asks for joint relief, determine whether or not the controversy disclosed by the complaint is separable. *Automobile Ins. Co. v. Harrison (D. C.-N. Y.)*, 7 Fed. Supp. 846.

It is the controversies, disclosed by the facts pleaded in the complaint, not the legal conclusions the pleader alleges results from those facts, nor his averment of joint liability or joint action, nor his prayer for relief that determines whether or not the controversy alleged by the complaint are separable. *Bagwell v. Southern R. Co. (D. C.-S. Car.)*, 21 Fed. Supp. 751.

Petition charging failure to give signal and keep lookout, and to maintain gates at crossing, resulting in collision with automobile driven by plaintiff's intestate, stated a joint and not a separable controversy against railroad company and its fireman. *Chesapeake & O. R. Co. v. McCoy*, 228 Ky. 752, 16 S. W. (2d) 170.

Where the complaint set forth a cause of action based on conspiracy between defendants, there is no separable controversy where the cause of action alleged is joint and not severable. *Newberry v. Meadows Fertilizer Co.*, 202 N. Car. 416, 163 S. E. 116.

Petition by one defendant alleging diversity of citizenship between himself and plaintiffs, but showing that other defendants were residents of same state as plaintiff, without averment of separable controversy was insufficient. *Sabens v. Cochrum* (Tex. Civ. App.), 292 S. W. 281.

Suits under Constitution, Laws or Treaties.

Under the Judiciary Act of 1875 a cause was removable if the record at the time of removal showed that either party claimed a right under the Constitution or laws of the United States. *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. 1104; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. 819; *Tennessee v. Union & Planters Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. 654; *Illinois ex rel. Hunt v. Illinois Cent. R. Co.* (C. C.-Ill.), 33 Fed. 721; *Wabash R. Co. v. Barbour* (C. C. A. 6), 73 Fed. 513; *Shields v. Boardman* (C. C.-Ohio), 98 Fed. 455; *Mayo v. Dockery* (C. C.-N. Car.), 108 Fed. 897; *Mitchell Engineering & Mach. Co. v. Worthington* (C. C.-Mont.), 140 Fed. 947; *Peoples U. S. Bank v. Goodwin* (C. C.-Mo.), 160 Fed. 727; *Hubbard v. Chicago, M. & St. P. R. Co.* (C. C.-Minn.), 176 Fed. 994.

To remove an action on the ground that it arose under the Constitution or laws of the United States, that fact must appear on the face of the plaintiff's initial pleading in his statement of his own case. *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. 34; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. 192; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. 869; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. 738; *Caples v. Texas & P. R. Co.* (C. C.-Tex.), 67 Fed. 9; *Wichita v. Missouri & K. Tel. Co.* (C. C.-Kans.), 122 Fed. 100; *Nelson v. Southern R. Co.* (C. C.-Ga.), 172 Fed. 478.

Not only must the grounds appear in the complaint, but they must so appear unaided by anything alleged in anticipation or in avoidance of defenses which may be interposed. *Minnesota v. Northern Secur. Co.*, 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598; *Western Union Tel. Co. v. Southeast & St. L. R. Co.* (C. C. A. 7), 208 Fed. 266; *Storm Lake Tub & Tank*

Factory v. Minneapolis & St. L. R. Co. (D. C.-Iowa), 209 Fed. 895.

A case can not be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless it appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want can not be supplied by any statement in the petition for removal, or, in the subsequent pleadings. *Minnesota v. Northern Secur. Co.*, 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598.

It is not enough, as the law now exists, that it appear that the defendant may find in the Constitution or laws of the United States some ground of defense. *In re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515.

Statements of complaint are test of removability. *Great Northern R. Co. v. Galbreath Cattle Co.*, 271 U. S. 99, 70 L. ed. 854, 46 Sup. Ct. 439.

Jurisdictional facts must appear on the face of the pleading to have existed at time suit was commenced as well as at time of filing petition for removal. *Huntington v. Pinney* (C. C.-Cal.), 126 Fed. 237.

Whether a case arises under the Constitution or laws of the United States, within the meaning of 7 F. C. A., Title 28, § 71; U. S. C. A., Title 28, § 71; *id.* U. S. C., must be determined from the necessary allegations in the statement of plaintiff's cause of action, without regard to any defenses which have been or may be interposed by the defendant, and also without reference to any allegations of the plaintiff in anticipation or denial of such possible defenses. *Monroe v. Detroit, M. & T. S. L. R. Co.* (D. C.-Mich.), 257 Fed. 782.

Federal question brought in by way of defense does not justify removal. *Ohio ex rel. Seney v. Swift & Co.* (C. C. A. 6), 270 Fed. 141.

Removal cause must be shown by plaintiff's pleading and averment in removal petition is not alone sufficient. *Bundick v. New York, P. & N. R. Co.* (D. C.-Va.), 17 Fed. (2d) 487.

Plaintiff's pleading must show that federal law is involved, it is not enough that defendant may find in the Federal Constitution and laws some ground of defense, and the court will not take judicial notice of facts not alleged. *Visayan*

Ref. Co. v. Standard Transp. Co. (D. C.-N. Y.), 17 Fed. (2d) 642.

Federal question must appear from the complainant's statement of his own claim and court is strictly limited to what appears on the face of the plaintiff's pleading. *Anderson v. Trotter* (D. C.-Cal.), 32 Fed. (2d) 389.

To remove case involving violation of Air Commerce Act and regulations thereunder, pleading must show federal question. *Craig v. Boling Air Transport, Inc.* (D. C.-Wash.), Oct. 1, 1929 U. S. Av. R. 101.

A cause may not be removed because a defendant pleads a federal question in its answer in a state court action, and a federal court will not enjoin such an action. *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.* (D. C.-Okla.), 6 Fed. Supp. 893.

Where plaintiff's cause of action arises under state statutes, a defense based upon rights arising under the Constitution or laws of the United States does not make it removable. *State ex rel. Jennings v. Ray* (D. C.-Okla.), 7 Fed. Supp. 417.

To bring a cause within the removal statute, a right or immunity created by the Constitution or laws of the United States must be an essential element of plaintiff's cause of action, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Georgia v. Southern R. Co.* (D. C.-Ga.), 25 Fed. Supp. 630.

Whether a case arises under a law of the United States depends on plaintiff's pleading as originally filed or afterwards amended. *Roxana Petroleum Corp. v. Dormire*, 161 Okla. 262, 18 Pac. (2d) 544.

While question whether case involves laws of the United States must be determined from the allegations of the complaint, it is otherwise where there is a fraudulent effort to conceal the true nature of the cause of action to prevent removal. *State ex rel. Department of Public Works v. Northern Pac. R. Co.*, 172 Wash. 37, 19 Pac. (2d) 128.

—Parties.

All the defendants must join in the application for removal. *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. 854; *Heffelfinger v. Choctaw, O. & G. R. Co.* (D. C.-Tenn.), 140 Fed. 75.

All defendants against whom alternative relief is sought must join in application for removal on this ground. *Consolidated Independent School Dist. v. Cross* (D. C.-Iowa), 7 Fed. (2d) 491.

Federal intermediate credit bank joined as party defendant with other defendants in a joint cause of action is not entitled to remove the case to the federal court without the consent of the other defendants. *Belcher v. Aetna Life Ins. Co.* (D. C.-Tex.), 3 Fed. Supp. 809.

Verification.

The party desiring to remove any action on the ground of prejudice or local influence is required to make and file a petition only, duly verified, in the state court in which the cause is pending. U. S. C., Title 28, § 72.

Verification by attorney. *Berry v. Mobile & O. R. Co.* (D. C.-Ky.), 228 Fed. 395; *Porter v. Coble* (C. C. A. 8), 246 Fed. 244.

Verification was sufficient, state law not being applicable. *S. B. McMaster, Inc. v. Chevrolet Motor Co.* (D. C.-S. Car.), 3 Fed. (2d) 469.

Verification may be on belief, and averments of law need not be verified. State rule as to verification does not apply, and direct legislation by Congress has removed the subject from the operation of the Conformity Act. *Herbert v. Roxana Petroleum Corp.* (D. C.-Ill.), 12 Fed. (2d) 81.

Verification before a notary of another state without proof of authority was insufficient. *Herbert v. Roxana Petroleum Corp.* (D. C.-Ill.), 12 Fed. (2d) 81.

The petition must be verified. *Sanders v. Atlantic Coast Line R. Co.* (D. C.-S. Car.), 33 Fed. (2d) 1010.

Petition verified on knowledge, information, and belief is sufficient. *Kinney v. Federal Land Bank*, 228 Ala. 25, 152 So. 30.

192. Order of Removal.

(Caption.)

The defendant, having within the time provided by law filed his petition praying for the removal of this cause to the United States District Court

for the — District of —, and having at the same time filed his bond in the sum of — dollars (\$—) with good and sufficient surety and conditioned according to law, it is on motion of — attorney for defendant,

Ordered, that said petition be and it hereby is accepted, and said bond is approved, and it is further

Ordered, that the above-entitled cause be removed to the United States District Court for the — District of —, and that all further proceedings in this court be stayed.

Judge.

Date—.

Note.

The use of such an order is optional and is by some regarded as unnecessary, inasmuch as the filing of a sufficient petition and the approval of the bond operate ipso facto to remove the cause to the United States District Court. If the plaintiff desires to contest the removal, he may do so only by making a motion in the United States District Court to remand the case to the state court from which it was removed.

Cross-Reference.

See notes to Form 191.

Statutory Reference.

Procedure after removal, 7 F. C. A., Title 28, § 81; U. S. C. A., Title 28, § 81; id. U. S. C.

Federal Rules of Civil Procedure.

"These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury

under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States." Rule 81 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 81 (c): "Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

"U. S. C., Title 28:

- § 71 (Removal of suits from state courts)
- § 72 (Same; procedure)
- § 73 (Same; suits under grants of land from different states)
- § 74 (Same; causes against persons denied civil rights)
- § 75 (Same; petitioner in actual custody of state court)
- § 76 (Same; suits and prosecutions against revenue officers)
- § 77 (Same; suits by aliens)
- § 78 (Same; copies of records refused by clerk of state court)
- § 79 (Same; previous attachment bonds or orders)
- § 80 (Same; dismissal or remand)
- § 81 (Same; proceedings in suits removed)
- § 82 (Same; record; filing and return)
- § 83 (Service of process after removal)

"U. S. C., Title 28, § 72, supra, however, is modified by shortening the time for pleading in removed actions."

NOTES TO DECISIONS

Procedure after Removal.

In an action removed from a state court to recover both actual and punitive

damages, the plaintiff, who has been awarded actual damages only, may appeal from the judgment, even though

the state practice may be to the contrary. *Galloway v. General Motors Acceptance Corp.* (C. C. A. 4), 106 Fed. (2d) 466.

Federal Rules of Civil Procedure govern all procedure after removal in civil actions removed to the district court from a state court. *Moore v. Illinois Cent. R. Co.* (D. C.-Miss.), 24 Fed. Supp. 731; *Borton v. Connecticut General Life Ins. Co.* (D. C.-Nebr.), 25 Fed. Supp. 579; *Shell Petroleum Corp. v. Stueve* (D. C.-Minn.), 25 Fed. Supp. 879.

The Federal Rules of Civil Procedure should be applied to removed actions pending on the effective date of the rules, unless their application would not be feasible or would work an injustice. *Gay v. Moore, Inc.* (D. C.-Okla.), 26 Fed. Supp. 749.

Upon removal of cause from state to federal court, repleading is not necessary. *Murphy v. E. I. DuPont De-Nemours & Co.* (D. C.-Pa.), 26 Fed. Supp. 999.

In an action removed from a state to a federal court, a demand for trial by jury made in the state court before removal is sufficient reservation to entitle the party to a jury trial in the federal court. *Angel v. McLellan Stores Co.* (D. C.-Tenn.), 27 Fed. Supp. 893.

The complaint in a stockholder's derivative action, removed from a state court solely on the ground of a federal question, need not aver that plaintiff was a shareholder at the time of the transaction of which he complains or that his share devolved on him by operation of law. *Jablow v. Agnew* (D. C.-N. Y.), 30 Fed. Supp. 718.

193. Removal Bond.

Know all men by these presents, That we AB, as principal, and CD and EF as sureties, are held and bound unto GH in the sum of — dollars (\$—), to be paid to the said GH, his executors, administrators, or assigns, to which payment we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally.

Sealed with our seals this — day of —, 19—.

Whereas, the said AB, has petitioned the — Court of —, for the removal of a cause therein pending, wherein GH is plaintiff, and AB is defendant, to the District Court of the United States for the — District of —;

Now, therefore, the condition of this obligation is such that if the said AB shall enter in such District Court of the United States for the — District of —, — Division, within thirty days from the date of filing said petition, a certified copy of the record in such action, and shall pay all costs that may be awarded by said District Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

AB.

CD.

EF.

Date—.

(Justification of sureties.)

Cross-Reference.

See notes to Form 191.

NOTES TO DECISIONS

Sufficiency of Bond.

Signature of principal on bond is not essential. *Stevens v. Richardson* (C. C.-N. Y.), 9 Fed. 191; *Public Grain & Stock Exch. v. Western Union Tel. Co.* (C. C.-Ill.), 16 Fed. 289; *Herbert v. Roxana Petroleum Corp.* (D. C.-Ill.), 12 Fed. (2d) 81.

Where bond contained no provision for costs as required by Act of 1875, the cause was not properly removable. *Sheldrick v. Cockcroft* (C. C.-Conn.), 27 Fed. 579.

Where bond has not been signed by either principal or surety, court will not entertain cause on removal. *Clark v. Guy* (C. C.-Conn.), 114 Fed. 783.

Bond held sufficient. *Groton Bridge & Mfg. Co. v. American Bridge Co.* (C. C.-N. Y.), 137 Fed. 284. But see *Webber v. Bishop* (C. C.-N. Y.), 13 Fed. 49.

Bond signed by attorney in fact was sufficient, though not accompanied by power of attorney. *Mutual Life Ins. Co. v. Langley* (C. C.-S. Car.), 145 Fed. 415.

Bond conditioned alternatively upon filing the record in the district of suit pending or in another specified district is insufficient. *Webb v. Southern R. Co.* (C. C. A. 5), 248 Fed. 618.

Bond need not be acknowledged. *Herbert v. Roxana Petroleum Corp.* (D. C.-Ill.), 12 Fed. (2d) 81.

194. Motion to Remand Removed Cause.

(Caption.)

Plaintiff moves this court to remand the above-entitled cause to the — Court of —, in the state of —, on the ground that this court is without jurisdiction to hear and determine the cause, and upon the further ground that the petition (or bond) for removal is defective.

Date—.

Attorney for plaintiff.**Cross-Reference.**

See notes to Form 191.

Statutory Reference.

Dismissal or remand of actions, 7 F. C. A., Title 28, § 80; U. S. C. A., Title 28, § 80; *id.* U. S. C.

195. Notice of Motion to Remand.

(Caption.)

To—
Attorney for defendant.

Address.

Please take notice that the undersigned will bring the attached motion to remand on for hearing before this court at Room — [name and location of building], on the — day of —, 19—, at — M. in the forenoon of that day or as soon thereafter as counsel can be heard.

Attorney for plaintiff.

Date—.

Address.

Cross-Reference.

See notes to Form 191.

Statutory Reference.

Dismissal or remand of suits, 7 F. C. A., Title 28, § 80; U. S. C. A., Title 28, § 80; id. U. S. C.

196. Order Denying Motion to Remand.

(Caption.)

This cause came on to be heard on plaintiff's motion to remand and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby denied, and the cause be retained in this court.

Date——.

United States district judge.

Cross-Reference.

See notes to Form 191.

Statutory Reference.

Dismissal or remand of suits, 7 F. C. A., Title 28, § 80; U. S. C. A., Title 28, § 80; id. U. S. C.

197. Order Granting Motion to Remand.

(Caption.)

This cause came on to be heard on plaintiff's motion to remand and after argument of counsel and full consideration thereof, it is,

Ordered, that said motion be and the same is hereby granted and this cause be and the same is hereby remanded to the —— Court of the county of ——, state of ——.

Date——.

United States district judge.

Cross-Reference.

See notes to Form 191.

Statutory Reference.

Dismissal or remand of suits, 7 F. C. A., Title 28, § 80; U. S. C. A., Title 28, § 80; id. U. S. C.

CHAPTER 9

DEFENDANT'S MOTIONS AND ANSWERS

Form

- 205. Motion for security for costs.
- 206. Order requiring security for costs.
- 207. Bond for costs.
- 208. Motion to strike.
- 209. Notice of motion (alternative form).
- 210. Order striking redundant matter from pleading.
- 211. Motion for more definite statement.
- 212. Order for more definite statement.
- 213. Motion for bill of particulars.
- 214. Order for bill of particulars.
- 215. Motion to strike pleading for failure to obey order for bill of particulars.
- 216. Order striking pleading for failure to obey order for bill of particulars.
- 217. Objections to interrogatories.
- 218. Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under Rule 12 (b).

Form

- 219. Order dismissing complaint.
- 220. Motion joining several defenses.
- 221. Answer presenting defenses under Rule 12 (b).
- 222. Answer to complaint set forth in Form 83, with counterclaim for interpleader.
- 223. Motion for leave to present counterclaim by supplemental pleading.
- 224. Motion for leave to amend answer to set up counterclaim.
- 225. Denial of existence of a corporation.
- 226. Denial of assignment of claim.
- 227. Denial that party is executor.
- 228. Denial of partnership.
- 229. Denial of guardianship.
- 230. Denial of capacity of unincorporated association.
- 231. Denial of capacity of receiver to be sued.

INTRODUCTION.—The defendant is required to state his defenses to each claim in short and plain terms and to admit or deny the averments contained in it. A statement that the defendant is without knowledge or information sufficient to form a belief as to the truth of certain allegations in the complaint has the effect of a denial. Matter constituting an avoidance or affirmative defense must be set forth affirmatively. Rule 8 (c) enumerates a number of defenses which must be so pleaded. Among them are the statute of frauds, the statute of limitations, laches, and res judicata.

The defendant is required to answer within twenty days after the service of the summons and complaint, except that in actions against the United States or against a government officer or agency the time is prolonged to sixty days. If, however, a motion is filed directed to the complaint, the time to answer is extended for ten days after notice of the court's action denying the motion or postponing its disposition until trial. If the court grants a motion for a more definite statement or for a bill of particulars, the defendant may serve his answer within ten days after compliance with the order on such motion.

Certain defenses and objections may, at the option of the pleader, be made by motion. They are lack of jurisdiction over the subject-matter,

lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, and failure to state a claim on which relief can be granted. Such a motion must be interposed before pleading. No defense or objection is waived by being joined with other defenses or objections. Thus, a defendant may challenge the jurisdiction of the court and question the sufficiency of the complaint in the same motion, without waiving his right to the first of these objections.

A motion to dismiss the complaint for failure to state a claim is limited to testing the sufficiency of its allegations. It may not be aided by facts outside of the pleading. In other words, the principle banning "speaking demurrers" still prevails. On the other hand, since a bill of particulars becomes a part of the pleading, it may be considered on a motion to dismiss the latter for insufficiency.

Before a responsive pleading is filed or within twenty days after the service of the prior pleading, if no response is required, a motion may be made for a more definite statement or for a bill of particulars. The principal function of a more definite statement or a bill of particulars is to clarify the pleading to which it relates and to enable the moving party to formulate his response. No attempt should be made to use this motion as a substitute for discovery.

205. Motion for Security for Costs.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Please take notice that on —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order requiring plaintiff to furnish security for costs herein, on the ground that the plaintiff is a nonresident of the state of —, but is a resident of the state of —.

Attorney for defendant.

Date—.

Address.

Cross-References.

Suits by "poor persons," Forms 55, 56, and notes thereto.

Advisory notes to Rules 7 (b) (c), 8 (e), 10 (a), 11, see Form 56.

Statutory References.

Defects in form immaterial, 8 F. C. A., Title 28, § 777; U. S. C. A., Title 28, § 777; id. U. S. C.

Suing or defending as poor person, 8 F. C. A., Title 28, §§ 832 to 836; U. S. C. A., Title 28, §§ 832 to 836; id. U. S. C.

Federal Rules of Civil Procedure.

"(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

"(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules." Rule 7 (b).

"Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." Rule 7 (c).

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

"(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11." Rule 8 (e).

"All pleadings shall be so construed as to do substantial justice." Rule 8 (f).

"For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." Rule 9 (f).

"Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." Rule 10 (a).

"Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be

stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. * * * The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted." Rule 11.

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." Rule 12 (b).

"A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the de-

fenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert." Rule 12 (g).

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received." Rule 12 (h).

NOTE OF ADVISORY COMMITTEE TO RULE 8 (f): "A provision of like import is of frequent occurrence in the codes. Ill. Rev. Stat. (1937), ch. 110, § 157 (3); 2 Minn. Stat. (Mason, 1927), § 9266; N. Y. C. P. A. (1937) § 275; 2 N. D. Comp. Laws Ann. (1913) § 7458."

NOTE OF ADVISORY COMMITTEE TO RULE 12 (b) and (d): "1. See generally Equity Rules 29 (Defenses—How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties—Resisting Objection), and 44 (Defect of Parties—Tardy Objection); N. Y. C. P. A. (1937) §§ 277-280; N. Y. R. C. P. (1937) Rules 106-112; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r. r. 1-4; Clark, Code Pleading (1928) pp. 371-381.

"2. For provisions authorizing defenses to be made in the answer or reply see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r. r. 1-4; 1 Miss. Code Ann. (1930) §§ 378, 379. Compare Equity Rule 29 (Defenses—How Presented); U. S. C., Title 28, § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U. S. C., Title 28, § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the suffi-

ciency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif. Code Civ. Proc. (Deering, 1937) § 433; 4 Nev. Comp. Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif. Code Civ. Proc. (Deering, 1937) § 431; 4 Nev. Comp. Laws (Hillyer, 1929) § 8598.

"3. Equity Rule 29 (Defenses—How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn. Code Ann. (Williams, 1934) § 8784; Ala. Code Ann. (Michie, 1928) § 9479; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, §§ 15-18; Kansas Gen. Stat. Ann. (1935) §§ 60-705, 60-706."

NOTE OF ADVISORY COMMITTEE TO RULE 12 (g): "Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; N. M. Rules of Pleading, Practice and Procedure, 38 N. M. Rep. vii [105-408] (1934); Wash. Gen. Rules of the Superior Courts, 1 Wash. Rev. Stat. Ann. (Remington, 1932) p. 160, Rule VI (e) and (f)."

NOTE OF ADVISORY COMMITTEE TO RULE 12 (h): "Compare Calif. Code Civ. Proc. (Deering, 1937) § 434; 2 Minn. Stat. (Mason, 1927) § 9252; N. Y. C. P. A. (1937) §§ 278 and 279; Wash. Gen. Rules of the Superior Courts, 1 Wash. Rev. Stat. Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues U. S. C., Title 28, § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while U. S. C., Title 28, § 399 (Amendments to show diverse citizenship) is continued by Rule 15."

NOTES TO DECISIONS

Appeal.

An order overruling a motion to quash the summons is not a final order and therefore not appealable. *Street & Smith Publications, Inc. v. Spikes* (C. C. A. 5), 107 Fed. (2d) 755.

Consolidation of Motions.

The joinder of a motion to dismiss for lack of jurisdiction over the person with a motion to dismiss for want of equity and for failure to join indispensable parties defendant does not waive the jurisdictional defense. *American-Mexican Claims Bureau v. Morgenthau* (D. C. C.), 26 Fed. Supp. 904.

A party who has made a motion which is insufficient as to length of notice is not precluded from making a corrective motion on the same grounds. *Mutual Life Ins. Co. v. Egeline* (D. C.-Cal.), 30 Fed. Supp. 738.

An insufficient notice of motion is waived by failure to object thereto and participating in the hearing on the motion. *Mutual Life Ins. Co. v. Egeline* (D. C.-Cal.), 30 Fed. Supp. 738.

A party may not move to dismiss for lack of venue after denial of a motion made by him to set aside service of process. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* (D. C.-Pa.), 31 Fed. Supp. 403.

A motion to dismiss for insufficiency may be made after an earlier motion to dismiss for lack of jurisdiction has been denied. *Martin v. Moery* (D. C.-Ill.), 43 Bull. 6, 1 Fed. R. Dec. 127.

Defenses and Objections—When Presented [Rule 12 (a)].

A defense that an order to show cause was insufficient process made for the first time in briefs on appeal comes too late. *Carter v. Powell* (C. C. A. 5), 104 Fed. (2d) 428.

If a third-party defendant is brought in by an ex parte order, the better practice for contesting the sufficiency of the third-party complaint is by a motion to vacate the order granting leave to file it and to strike the complaint, rather than by a motion to dismiss the third-party complaint. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

Demurrers and Pleas Abolished.

Where a demurrer has been filed, challenging the sufficiency of the statement of a claim to set out a cause of action, and the case was heard on the demurrer after the effective date of the rules abolishing demurrers, the demurrer will be construed, under Rule 12, to be a motion to dismiss for failure to state a claim on which relief may be granted. *Ashman v. Coleman* (D. C.-Pa.), 25 Fed. Supp. 388; *Lewis v. United States* (D. C.-Tenn.), 27 Fed. Supp. 894.

Demurrer filed prior to the effective date of the rules, attacking the sufficiency of a counterclaim, should be treated as a motion for a more definite statement of claim. *Shell Petroleum Corp. v. Stueve* (D. C.-Minn.), 25 Fed. Supp. 879.

A demurrer may be treated as a motion to dismiss. *Gay v. Moore* (D. C.-Okla.), 26 Fed. Supp. 749; *Howard v. United States* (D. C.-Wash.), 28 Fed. Supp. 985; *Murphy v. Puget Sound Mtg. Co.* (D. C.-Wash.), 31 Fed. Supp. 318; *United States v. Smith* (D. C.-Pa.), 31 Fed. Supp. 359.

Demurrer may be treated as a motion for judgment on the pleadings. *Equitable Life Assur. Soc. v. Kit* (D. C.-Pa.), 26 Fed. Supp. 880; *Lehigh Valley Trust Co. v. United States* (D. C.-Pa.), 4 Bull. 2.

A demurrer to an amended answer by a respondent individually and as guardian of another respondent, and motion to strike from such amended answer the portion demurred to, and to make the answer more definite and certain, was properly denied. *New York Life Ins. Co. v. Coldiron* (D. C.-Wash.), 2 Bull. 2.

Demurrer filed prior to effective date of the rules, on the ground that the action was barred by the statute of limitations, was treated as a motion to dismiss for lack of jurisdiction under Rule 12 (b). *Sullivan v. United States* (D. C.-Ky.), 17 Bull. 3.

How Presented [Rule 12 (b)].

A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Leimer v. State Mut. Life Assur. Co.* (C. C. A. 8), 108 Fed. (2d) 302.

Objections to complaints should be made by motion and not by rule. *Rosenberg v. Hano & Co.* (D. C.-Pa.), 26 Fed. Supp. 160.

Compliance with state law requiring nonresident corporation to file certificate and designate resident person for service of process before doing business in the state does not constitute such corporation a resident of the state for purposes of venue. *Toulmin v. James Mfg. Co.* (D. C.-N. Y.), 27 Fed. Supp. 512.

A complaint, in an action on a contract, which alleges the contract, performance by plaintiff, and failure to perform on the part of defendant, is good as against a motion to dismiss for insufficiency. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

In a complaint in an action to cancel insurance policy for misrepresentation in that the insured falsely denied the existence of any infirmity, the nature of the infirmity need not be alleged. *Federal Life Ins. Co. v. Holod* (D. C.-Pa.), 28 Fed. Supp. 270.

A complaint in an action for treble damages under the antitrust laws, which merely alleges commission of acts forbidden by the statutes and claims damages resulting therefrom, is insufficient. Such a complaint must affirmatively allege injury to plaintiff's business or property. *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. Y.), 30 Fed. Supp. 389.

Federal courts are not obliged to follow state court rulings on matters of procedure. *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. J.), 30 Fed. Supp. 389.

Cooperative associations of citrus fruit growers in California brought an action in the federal court in that state for injunctive and declaratory relief against the enforcement of regulations promulgated under the Fair Labor Standards Act. The administrator of the Wage and Hour Division, Department of Labor, whose official residence is in the District of Columbia, and regional officers of the division in California, were joined as defendants. The complaint was dismissed as to the administrator on the ground that he was a resident of the District of Columbia. The complaint should be dismissed for insufficiency since the administrator was an indispensable party and the relief sought could not be granted as against the remaining defend-

ants, who lacked authority to institute proceedings for violations of the regulations. *Redlands Foothill Groves v. Jacobs* (D. C.-Cal.), 30 Fed. Supp. 995.

The sufficiency of a defense may be tested by objections thereto, which may be passed on in advance of trial. *Dysart v. Remington Rand, Inc.* (D. C.-Conn.), 31 Fed. Supp. 296.

Motion or Pleading other than Motion to Dismiss.

A motion for security for costs is not a "defense" nor an "objection" under par. (h) of Rule 12 and is, therefore, not waived, if not presented by one of the motions enumerated in this paragraph. *Wheeler v. Lientz* (D. C.-Mo.), 25 Fed. Supp. 939.

Paragraph (b) of Rule 12 does not contain an exhaustive enumeration of motions permitted under the new rules and the fact that it does not mention motions for security for costs does not prevent use of such motions under proper circumstances. *Wheeler v. Lientz* (D. C.-Mo.), 25 Fed. Supp. 939.

In an action on an insurance policy, a motion to strike a defense from the answer will be denied where insurer asserts that a provision of the policy has been violated in that other insurance has been taken on the property, although evidence may be adduced that this provision has been waived. *Abruzzino v. National Fire Ins. Co.* (D. C.-W. Va.), 26 Fed. Supp. 934.

Failure to state a claim for relief may be raised as an affirmative defense in the answer as well as by a motion to dismiss. *Goodman v. United States* (D. C.-Iowa), 28 Fed. Supp. 497.

A motion to set aside service of summons and complaint should not be entertained unless made within the 20-day period for filing answer. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp. et al.* (D. C.-Pa.), 31 Fed. Supp. 403.

A motion to strike which has been filed for purpose of raising question of sufficiency should be treated as a motion to dismiss. *United States v. Fay*, (D. C.-Pa.), 31 Fed. Supp. 413.

Motions and Other Papers [Rule 7 (b)].

An oral statement of the grounds for a written motion for directed verdict is sufficient compliance with the rules re-

quiring motions to state the grounds therefor. *Pickering v. Corson* (C. C. A. 7), 108 Fed. (2d) 546.

A motion to dismiss may not be made orally during the argument on another motion, but must be made in writing. *Hammond-Knowlton v. Hartford-Connecticut Trust Co.* (D. C.-Conn.), 26 Fed. Supp. 292.

Motions made at a hearing and which do not have to be reduced to writing are obviously such as are incidental to the hearing itself. *Hammond-Knowlton v. Hartford-Connecticut Trust Co.* (D. C.-Conn.), 26 Fed. Supp. 292.

Oral argument on a motion previously made is not the "hearing" at which the necessity for reducing motions to writing may be obviated. *Hammond-Knowlton v. Hartford-Connecticut Trust Co.* (D. C.-Conn.), 26 Fed. Supp. 292.

A motion which is so involved and indefinitely phrased as to be confusing constitutes failure to proceed in accordance with the rules and should be denied without prejudice. *Barrezueta v. Sword S. S. Line, Inc.* (D. C.-N. Y.), 27 Fed. Supp. 935.

A motion to dismiss another motion is an unnecessary pleading and should be stricken. *Berens v. Berens* (D. C.-D. C.), 30 Fed. Supp. 869.

Motion to Dismiss.

In a case in which argument was had subsequent to September 16, 1938, on an affidavit of defense filed prior to that date under the Pennsylvania Practice Act, such affidavit should be treated as equivalent of a motion to dismiss under the new rules. *Knecht v. Castleman River R. Co.* (D. C.-Pa.), 25 Fed. Supp. 652, *affd.* 104 Fed. (2d) 677.

Motion to dismiss under federal rules is essentially the same as demurrer in early equity practice, and such motion would be overruled where it brought in matter not alleged or appearing in the complaint. *McConville v. District of Columbia* (D. C.-D. C.), 26 Fed. Supp. 295.

In an action in equity brought before the effective date of the rules, a motion to quash the subpoena on the grounds of defective service and want of jurisdiction, was treated as a motion to dismiss for lack of jurisdiction over the person. *International Molders Union v. National Labor Relations Bd.* (D. C.-Pa.), 26 Fed. Supp. 423.

A demurrer may be treated as a motion to dismiss. *Gay v. Moore* (D. C.-Okla.), 26 Fed. Supp. 749; *Howard v. United States* (D. C.-Wash.), 28 Fed. Supp. 985; *Murphy v. Puget Sound Mtg. Co.* (D. C.-Wash.), 31 Fed. Supp. 318.

A motion to dismiss is the proper method of raising the objection of lack of jurisdiction over the defendants. *Massachusetts Farmers Defense Committee v. United States* (D. C.-Mass.), 26 Fed. Supp. 941.

A seaman hurt on board ship brought suit against defendants as trustees in bankruptcy of the subsidiary corporation which owned the ship and also in their capacity as trustees of the parent corporation. Defendants had been discharged as trustees of the subsidiary corporation. As court has no jurisdiction over trustees who have been discharged, motion to dismiss the complaint as against the defendants in that capacity should be granted. *Nielson v. Farley* (D. C.-N. Y.), 26 Fed. Supp. 948, 1939 A. M. C. 84.

In an action by a nonresident against a foreign corporation which, in compliance with state law, had consented to suit in that state for the purpose of securing a license to do business therein, a motion to dismiss for lack of jurisdiction over the defendant should be granted since compliance with the state statute does not constitute consent to be sued in a district other than that of a state in which the corporation was organized or in a district other than that of the plaintiff, if service can be had on defendant in that district. *Hamilton Watch Co. v. George W. Borg Co.* (D. C.-Ill.), 27 Fed. Supp. 215.

An affidavit of defense under the Pennsylvania Practice Act raising questions of law is equivalent to a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12 (b) of the federal rules of civil procedure. *S. & R. Grinding & Mach. Co. v. United States* (D. C.-Pa.), 27 Fed. Supp. 429.

The filing of a motion to dismiss on the ground of lack of jurisdiction over subject-matter does not constitute a general appearance. *Toulmin v. James Mfg. Co.* (D. C.-N. Y.), 27 Fed. Supp. 512.

The new rules were applied by the court to a complaint served over a year prior to their effective date, on a motion to dismiss coming on for hearing after

such date. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

A motion to dismiss for failure to state a claim may be directed to the complaint as supplemented by a bill of particulars. *Mahoney v. Bethlehem Eng. Corp.* (D. C.-N. Y.), 27 Fed. Supp. 865; *Reilly v. Wolcott* (D. C.-N. Y.), 24 Bull. 2, 1 Fed. R. Dec. 105.

A third-party defendant may obtain dismissal for insufficiency, as against it, of both the plaintiff's complaint and the third-party plaintiff's complaint, when the plaintiff's complaint fails to state a claim upon which relief can be granted. *Duarte v. Christie Scow Corp.* (D. C.-N. Y.), 27 Fed. Supp. 894.

The complaint, in an action by the judgment creditor of a taxpayer against the collector of internal revenue to recover taxes erroneously collected, should be dismissed for insufficiency as the plaintiff has no standing to maintain the action. *Ungar v. Higgins* (D. C.-N. Y.), 27 Fed. Supp. 904.

The defense of res judicata may not be asserted by motion to dismiss but should be set forth affirmatively in the answer, if the prior adjudication is not disclosed by the complaint. *Holmberg v. Hannaford* (D. C.-Ohio), 28 Fed. Supp. 216.

The defenses of laches and statute of limitations should be raised by an answer affirmatively setting forth the claims, in those respects rather than by a motion to dismiss. *Holmberg v. Hannaford* (D. C.-Ohio), 28 Fed. Supp. 216.

A motion to dismiss is not the proper procedure by which to secure more particular or definite information concerning plaintiff's claim. *Federal Life Ins. Co. v. Holod* (D. C.-Pa.), 28 Fed. Supp. 270.

Facts appearing in affidavits, depositions and answers to interrogatories may be considered in the disposition of a motion to dismiss. *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386.

A motion to dismiss the complaint on the ground it fails to state a claim must be limited to the pleadings and may not be supported by affidavits. Where affidavits are relied upon, the proper motion is for summary judgment. *Sherover v. Wanamaker* (D. C.-N. Y.), 29 Fed. Supp. 650.

The licensee of a patent brought an action for a declaratory judgment to obtain a construction of the license agree-

ment, alleging that he had received notice of cancellation of the agreement from the licensor for nonpayment of royalties. Plaintiff did not ask the court to find that the agreement was either valid or invalid, but alleged merely that he was uncertain as to what course to pursue. No justiciable controversy was presented and complaint should be dismissed for insufficiency. *Duart Mfg. Co., Ltd. v. Philad Co.* (D. C.-Del.), 30 Fed. Supp. 777.

If the objections set forth in a motion to dismiss for insufficiency are found invalid, the court should not dismiss for insufficiency of its own motion on some other ground, since to do so would deprive the pleader of his right to amend. *Roloff v. Perdue* (D. C.-Iowa), 31 Fed. Supp. 739.

A motion to dismiss the complaint was considered timely, although filed subsequently to the filing of the answer, in view of the fact that the right to make such a motion was reserved in the answer. *Pesci v. Vieser & Son, Inc.* (D. C.-N. J.), 10 Bull. 4.

A motion to dismiss on the ground that the amount in controversy is less than \$3,000 should be denied if the complaint alleges that the amount involved, exclusive of interest and costs, is in excess of \$3,000, and nothing else appears in the record with respect to the amount in controversy. *Sun Oil Co. v. Pfeiffer* (D. C.-Okla.), 28 Bull. 8, 1 Fed. R. Dec. 119.

In an action for conspiracy to violate the antitrust laws, defendants' motion to dismiss the complaint for failure to allege that acts complained of were in restraint of interstate commerce, was denied pending service of a bill of particulars, which had been previously ordered, since the bill of particulars, which becomes a part of the complaint, might supply the deficiency in this respect. Leave to renew the motion after the bill of particulars has been filed was granted. *Folley Amusement Holding Corp. v. Randforce Amusement Corp.* (D. C.-N. Y.), 63 Bull. 6.

Time and Place [Rule 9 (f)].

In an action in which plaintiff claims wages paid to third persons, defendant was entitled to a more definite statement as to the dates when alleged payments were made. *Miller Co. v. Hyman* (D. C.-Pa.), 28 Fed. Supp. 312.

Waiver of Defenses.

The defense of insufficiency of process may not be raised for the first time in the Court of Appeals. The defendant is deemed to have waived all defenses not asserted by motion or answer, except failure to state a cause of action or lack of jurisdiction of the subject-matter. *Carter v. Powell* (C. C. A. 5), 104 Fed. (2d) 428.

The court may grant a motion to dismiss which is contained in a motion for judgment on the pleadings. *Missouri ex rel. De Vault v. Fidelity & Casualty Co.* (C. C. A. 8), 107 Fed. (2d) 343.

The provision of Rule 12 (b) that no defense is waived by being joined with another should not be applied in an action pending on the effective date of the new rules, in which jurisdiction of the person of the defendant had already been acquired by virtue of his having filed an answer joining objections to jurisdiction and defenses on the merits. *Schlaefel v. Schlaefel*, — App. D. C. —, 112 Fed. (2d) 177.

After the defense of insufficiency of service of process has been disposed of on motion to quash, such defense may not be again interposed in the answer. Failure to do so does not constitute a waiver of the objection. *Molesphini v. Bruno* (D. C.-N. Y.), 26 Fed. Supp. 595.

Motion to dismiss on the ground that defendant does not reside in district in which suit is brought should be denied upon showing by plaintiff that in statement accompanying registration of motor vehicles defendant declared his residence to be in said district. *Gallagher v. Carroll* (D. C.-N. Y.), 27 Fed. Supp. 568.

Where defendant failed to make motion to dismiss complaint at proper time, it could still make a motion for judgment on the pleadings. *Duarte v. Christie Scow Corp.* (D. C.-N. Y.), 27 Fed. Supp. 894.

An affirmative defense of lack of jurisdiction pleaded in the answer may not be brought on for hearing by a motion for judgment on the pleadings. It might have been raised by motion to dismiss prior to answer. Having answered, the defendant may not raise it again until the trial, when it may be brought up by a motion to dismiss. *Gantz v. National Casualty Co.* (D. C.-N. Y.), 29 Fed. Supp. 41.

Removal of an action from a state court to the federal court does not constitute a general appearance or waive defects in service of process. *Zoller v. Smith, Levin & Harris, Inc.* (D. C.-N. Y.), 30 Fed. Supp. 435.

206. Order Requiring Security for Costs.

(Caption.)

This action was heard on defendant's motion to require plaintiff to furnish security for costs, and it appearing that plaintiff is a nonresident of the state of —, but is a resident of the state of —, and the court being fully advised, it is

Ordered, that AB, plaintiff in this action, be and he is hereby directed to furnish security for costs herein in the sum of — dollars (\$—); and it is further

Ordered, that defendant's time to answer or move in regard to the complaint is hereby extended until 10 days after service on him of notice of filing security as aforesaid; and it is further

Ordered, that all further proceedings on the part of the plaintiff in this action be, and they hereby are, stayed until he furnishes security, as aforesaid.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 205.

207. Bond for Costs.

District Court of the United States

_____ District of _____

_____ Division

v.

Civil No. _____

Know all men by these presents, that _____ are held and firmly bound unto _____, his executors, administrators, or assigns, in the sum of _____ dollars (\$_____), lawful money of the United States of America, to be paid unto the said _____, his executors, administrators, or assigns, to which payment well and truly to be made, they bind themselves, their heirs, executors, and administrators, jointly and severally by these presents.

Sealed with their seal and dated this _____ day of _____, 19____.

Whereas, the above-named _____ heretofore _____ citizen of the state of _____ commenced an action in the United States District Court, in and for the _____ District of _____, against the said _____,

Now therefore the condition of this obligation is such that if the above-named _____ in the said action shall pay on demand, all costs that may be adjudged, or awarded against _____ as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of

_____ [SEAL]
 _____ [SEAL]
 _____ [SEAL]

UNITED STATES OF AMERICA, } ss:
 DISTRICT OF _____.

_____ being duly sworn, upon his oath, doth depose and say, that he is a resident and freeholder within the state of _____, and that he is worth the sum of _____ dollars (\$_____), over and above all his just debts and liabilities, which he owes or has incurred, and in property not exempt from execution.

Sworn and subscribed to before me this _____ day of _____, 19____.

 Clerk, United States District Court.

UNITED STATES OF AMERICA, }
 DISTRICT OF ———, } ss:

—— being duly sworn, upon his oath, doth depose and say, that he is a resident and freeholder within the state of ———, and that he is worth the sum of ——— dollars (\$——), over and above all his just debts and liabilities, which he owes or has incurred, and in property not exempt from execution.

Sworn and subscribed to before me this ——— day of ———, 19——.

 Clerk, United States District Court.

Cross-Reference.

See notes to Form 205.

208. Motion to Strike.

(Caption.)

Defendant moves the court to strike from the complaint herein the allegations hereinafter specified on the ground that they are redundant (immaterial) (impertinent) (scandalous).

1. Paragraphs ———, ———, and ———.
2. Paragraph ——— except the first sentence thereof.
3. That part of paragraph ——— beginning with the word “——” in the ——— sentence thereof and continuing to the end of the paragraph.

 Attorney for defendant.

 Address.

Note.

This motion may also be used by defendant in respect to the reply and by plaintiff in respect to the answer.

Cross-References.

See notes to Form 205.

Advisory notes to Rule 12 (f), see Form 211.

Federal Rules of Civil Procedure.

“Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court’s own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.” Rule 12 (f).

NOTES TO DECISIONS

Motion to Strike [Rule 12 (f)].

In an action for negligence against deceased’s employer, allegations that certain provisions of the State Workmen’s Compensation Law are unconstitutional, are redundant and immaterial

if it appears that such provisions do not apply to plaintiff’s claim, and defendant’s motion to strike such allegations should be granted. *Mendola v. Carborundum Co.* (D. C.-N. Y.), 26 Fed. Supp. 359.

In an action for declaratory relief adjudging that plaintiff did not infringe defendant's patent, a motion by the latter to strike from the complaint allegations of unsuccessful attempts to imitate plaintiff and attempts surreptitiously to obtain an assignment of an application for patent upon plaintiff's device, should be granted as failing to comply with the requirements of simple, concise, and direct pleading. *Watts Elec. & Mfg. Co. v. United-Carr Fastener Corp.* (D. C. Mass.), 27 Fed. Supp. 277, 41 U. S. P. Q. 526.

Where a complaint setting out a claim for personal injuries based on negligence did not comply with these rules, nor with the Oregon Code provision, a motion to strike unnecessary words will be allowed. *Byers v. Clark & Wilson Lbr. Co.* (D. C. Ore.), 27 Fed. Supp. 302.

Although a complaint contains superfluous matter it should be disturbed with caution unless it clearly appears that such matter has no possible bearing upon the subject-matter of the litigation. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537; *Securities & Exch. Comm. v. Timetrust* (D. C.-Cal.), 28 Fed. Supp. 34.

In an action for patent infringement, plaintiff's motion to strike a counterclaim for declaratory judgment, which alleged noninfringement and invalidity, should be denied since, without such counterclaim, plaintiff could dismiss his action and thus leave undetermined the issue of validity. *Gregory v. Royal Typewriter Co., Inc.* (D. C.-N. Y.), 27 Fed. Supp. 808, 41 U. S. P. Q. 534.

Motion to strike out immaterial matter addressed to a number of paragraphs in complaint should be denied where granting it would make the complaint meaningless and in effect would amount to a dismissal. *Mahoney v. Bethlehem Eng. Corp.* (D. C.-N. Y.), 27 Fed. Supp. 865.

The sufficiency of any one or more of several defenses set forth in an answer may be tested by a motion to strike out such defenses. *United States v. Palmer* (D. C.-N. Y.), 28 Fed. Supp. 936.

Motion to dismiss the answer for insufficiency, and for judgment on the pleadings, should be treated solely as a motion to strike the answer, for if such motion is granted, defendant should be given an opportunity to amend. *United States v. Hoover* (D. C.-Ky.), 28 Fed. Supp. 936.

A pleading containing redundant, immaterial, and impertinent matter is objectionable and may be stricken. *Chambers v. Cameron* (D. C.-Ill.), 29 Fed. Supp. 742; *Radtke Patents Corp. v. C. J. Tagliabue Mfg. Co., Inc.* (D. C.-N. Y.), 31 Fed. Supp. 226.

Redundant matter may be allowed to remain in a pleading if it is not seriously prejudicial. *Frederick W. Huber, Inc. v. Pillsbury Flour Mills Co.* (D. C.-N. Y.), 30 Fed. Supp. 108; *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. Y.), 30 Fed. Supp. 389.

The mere presence of redundant and immaterial matter, not affecting the substance, is not sufficient ground for granting a motion to strike it from the complaint unless its retention would be prejudicial to the moving party. *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. Y.), 30 Fed. Supp. 389.

Allegations should not be stricken from an answer even if shown to be false, if they may raise an issue under any contingency. *Radtke Patents Corp. v. C. J. Tagliabue Mfg. Co., Inc.* (D. C.-N. Y.), 31 Fed. Supp. 226.

Liberal pleading should be permitted in defense of an allegation of fraud. *Radtke Patents Corp. v. C. J. Tagliabue Mfg. Co., Inc.* (D. C.-N. Y.), 31 Fed. Supp. 226.

A motion to strike is not appropriate to test the legal sufficiency of a defense. *Dysart v. Remington Rand, Inc.* (D. C.-Conn.), 31 Fed. Supp. 296.

The sufficiency of affirmative defenses may be tested by a motion to strike. *Teiger v. Oderwald, Inc.* (D. C.-N. Y.), 31 Fed. Supp. 626.

A motion to strike an affirmative defense which is not responsive to any charge in the complaint should be sustained. *Nordman v. Johnson City* (D. C.-Ill.), 13 Bull. 16, 1 Fed. R. Dec. 51.

A motion under Rule 12 (f), to strike redundant, immaterial, impertinent, or scandalous matter from the complaint, should be granted although the action was commenced as a suit in equity before the effective date of the new rules, in view of the fact that former Equity Rule 25 as extended by Equity Rule 20 contained requirements of pleading not materially different from those contained in Rule 8 of the new rules. *Shultz v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 18 Bull. 19, 1 Fed. R. Dec. 53.

Objections to the complaint on the ground that it does not conform to the provisions of Rule 8 (e) should be presented by motion to strike the objectionable provisions rather than by a motion to strike the entire complaint. *Shultz v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 18 Bull. 19, 1 Fed. R. Dec. 53.

Plaintiff's motion to strike defenses which were held insufficient at a former trial should be granted. *Phoenix Hdw. Co. v. Paragon Paint & Hdw. Corp.* (D. C.-N. Y.), 27 Bull. 6, 1 Fed. R. Dec. 116.

A motion to strike which has been filed for purpose of raising question of sufficiency should be treated as a motion to dismiss. *United States v. Fay* (D. C.-Pa.), 30 Bull. 13, 31 Fed. Supp. 413.

A motion to strike under Rule 12 (f) is not a proper method of raising the question of the sufficiency of a counterclaim or compliance with the rule requiring simplicity of pleading. This should be done by a motion to dismiss. *Myers v. Beckman* (D. C.-Okla.), 63 Bull. 16, 1 Fed. R. Dec. 99.

209. Notice of Motion (Alternative Form).

(Caption.)

Please take notice that the attorney for —, will move this court at a term thereof to be held at the United States court house, borough of —, city of New York, on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, for an order —, on the ground that —.

Attorney for —.

Address.

To _____
Attorney for —.

Note.

The foregoing is an alternative form that combines the motion and the notice in a single instrument. It is commonly

preferred in some districts, notably New York.

Cross-Reference.

See notes to Forms 205, 208.

210. Order Striking Redundant Matter from Pleading.

(Caption.)

This cause came on for hearing on defendant's motion to strike redundant matter from the complaint herein and after hearing counsel, and the court being fully advised in the matter, it is

Ordered, that the following matter be and it is hereby stricken from the complaint as redundant:

1. Paragraphs —, —, and —.
2. The last sentence of paragraph —.

3. All that part of paragraph — following the word “—” in the — sentence thereof.

Date—.

United States district judge.

Cross-Reference.

See notes to Forms 205, 208.

211. Motion for More Definite Statement.

(Caption.)

Defendant (plaintiff) moves the court for an order directing plaintiff (defendant) to file a more definite statement in the following particulars:

1. —.
2. —.
3. —.
4. —.

The grounds of the motion are that the complaint (answer) is too indefinite and uncertain to enable the defendant (plaintiff) to plead thereto because —.

Attorney for defendant (plaintiff).

Address.

Cross-Reference.

See notes to Form 205.

Federal Rules of Civil Procedure.

“Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the

court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements.” Rule 12 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 12 (e) (f): “Compare Equity Rules 20 (Further and Particular Statement in Pleading May be Required) and 21 (Scandal and Impertinence); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. r. 7, 7a, 7b, 8; 4 Mont. Rev. Codes Ann. (1935) §§ 9166, 9167; N. Y. C. P. A. (1937) § 247; N. Y. R. C. P. (1937) Rules 103, 115, 116, 117; Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 89-1033, 89-1034.”

NOTES TO DECISIONS

Actions for Damages.

In a complaint for damages suffered in collision between plaintiff's truck and defendant's automobile, a motion for bill of particulars as to the exact details of the collision will be denied. *Tarbet v.*

Thorpe (D. C.-Pa.), 25 Fed. Supp. 222.

In an action for personal injuries resulting from an automobile collision and for compensation for the death of plaintiff's daughter upon whom she depended for support, in which plain-

tiff alleged negligence generally, defendants' motion for a more definite statement, asking in what manner the defendants were negligent and the age of the daughter when killed, was granted. *Schmidt v. Going* (D. C.-Mo.), 25 Fed. Supp. 412.

In an action by seamen against the owner of the vessel for an assault by other seamen, defendant's motion for a bill of particulars was granted. *McKenna v. U. S. Lines* (D. C.-N. Y.), 26 Fed. Supp. 558.

In action for damages to trees, vegetation, health, and lives, by noxious vapors emanating from defendant's factory over plaintiff's land, and decreased rental value, with a lump sum asked for damages, defendant is entitled to a bill of particulars as to vegetation killed, health disturbed, and rentals lowered, but not as to manner of defendant's operation of its plant to produce the noxious vapors. *Murphy v. E. I. DuPont De Nemours & Co.* (D. C.-Pa.), 26 Fed. Supp. 999.

Motion for bill of particulars should not be denied solely because inquiries are multiple in form, if they are clear and understandable. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

A claim for damages for breach of contract should set forth specific items and not "lump" the damages. Hence, a plaintiff may be required, by a motion for a more definite statement, to set forth such items. *Miller Co. v. Hyman* (D. C.-Pa.), 28 Fed. Supp. 312.

In an action for treble damages for a conspiracy in restraint of trade under antitrust laws brought by a cooperative marketing association as assignee of the claims of its members against operators of chain grocery stores, in which it is alleged that defendants sold plaintiff's product as "loss leaders," thereby destroying competition and controlling prices of the product, defendants are entitled to a bill of particulars as to plaintiff's right of action and details of conspiracy; but plaintiff should not be required to furnish further particulars as to the volume of plaintiff's product sold on each day, to whom sold, and the sales methods used, and other matters that are the proper subject of discovery. *Louisiana Farmers Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (D. C.-Ark.), 31 Fed. Supp. 483.

In an action for personal injuries alleged to have been sustained on board a vessel, defendant is entitled to a bill of particulars stating the time of day of the injury, plaintiff's location at the time, the part of the vessel causing the injury, whether plaintiff was alone or working with other members of the crew, and in what respects the defendant was negligent. *Guerin v. Portland Trawling Co.* (D. C.-Mass.), 28 Bull. 9, 1 Fed. R. Dec. 64.

In an action for damages for cancellation of a contract for a sales agency, in which defendant pleads justification as an affirmative defense, plaintiff is entitled to a bill of particulars as to the manner in which plaintiff is alleged to have acted detrimentally to defendant and its dealers. *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.* (D. C.-N. Y.), 53 Bull. 20, 1 Fed. R. Dec. 19.

In a negligence action, plaintiff may be required to supply a bill of particulars as to the nature of his injuries, and the extent and duration of the disability therefrom. *McElwain v. Wickwire Spencer Steel Co.* (D. C.-N. Y.), 64 Bull. 17, 1 Fed. R. Dec. 177.

Compliance or Failure to Comply.

The penalty for failure properly to obey an order of court directing a party to furnish a bill of particulars may be to preclude that party from presenting evidence at the trial on the questions involved. *Newcomb v. Universal Match Corp.* (D. C.-N. Y.), 25 Fed. Supp. 169.

A bill of particulars may be asked before the action is at issue, and if plaintiff has not sufficient knowledge to furnish the particulars demanded, he may so state; he is permitted wide latitude to examine defendant's officers and witnesses to obtain the information, and may then be required to furnish such information not less than ten days before trial. *Graham v. New York & Cuba Mail S. S. Co.* (D. C.-N. Y.), 25 Fed. Supp. 224.

A motion to strike an answer for failure to comply with a demand for a bill of particulars will be denied on condition that the defendant supply all of the particulars of which he has knowledge. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

Under this section defendant can not require plaintiff to furnish a bill of par-

particulars after issue joined, but if plaintiff expresses a willingness at that time, to furnish such bill except as to two items, it will be regarded as consent with reference to the remaining items. *Michels v. Ripley* (D. C.-N. Y.), 26 Fed. Supp. 959.

A party may not refrain from supplying the information by bill of particulars merely because an insufficient answer might be construed as a contempt. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

The remedy for failure to comply with an order for a bill of particulars is a motion to strike out the pleadings and not a motion to bar the introduction of evidence at the trial. *Ferry-Hallock Co. v. Frost* (D. C.-N. Y.), 29 Fed. Supp. 43.

A party who has moved for a bill of particulars and who is subsequently served by his adversary with notice to take depositions may be entitled to a bill of particulars as to some of the items before the taking of the deposition and the service of a further bill as to the others may be postponed till after such time. *Varey v. Gaunt* (D. C.-N. Y.), 32 Bull. 14, 1 Fed. R. Dec. 204.

A party should not be permitted to postpone the filing of a bill of particulars until after taking of depositions to obtain information claimed to be necessary to enable him to furnish part of the particulars. He should be required to furnish such particulars as are within his knowledge and state under oath that he lacks knowledge as to others. Information subsequently obtained by depositions may then be included as acquired from time to time in supplemental bills of particulars. *Sapery v. United American Metals Corp.* (D. C.-N. Y.), 62 Bull. 21, 1 Fed. R. Dec. 106.

Information in response to an order for a bill of particulars may not be furnished by reference in an amended pleading to exhibits attached to a deposition. Since a bill of particulars becomes a part of the pleading, the information should be included therein. *Michelson v. Shell Union Oil Corp.* (Dist. of Mass.), 63 Bull. 13, 1 Fed. R. Dec. 183.

Definite Statements.

If a complaint is too vague to enable the defendant to prepare his answer or to prepare for trial, he should not move

to dismiss but should move for a more definite statement or a bill of particulars. *Berger v. McHugh* (D. C.-Pa.), 26 Fed. Supp. 107.

This rule was designed to avoid the distinction between a motion for a more definite statement and a motion for a bill of particulars. The latter motion must be made within 20 days after service of the pleading to which it is directed and will not be entertained as to the complaint, after issue is joined. *McKenna v. United States Lines* (D. C.-N. Y.), 26 Fed. Supp. 558; *Tully v. Howard* (D. C.-N. Y.), 27 Fed. Supp. 6.

In action on a fire insurance policy where defendant asserts that a provision of the policy as to permitting fire hazards has been violated, without more, the plaintiff is entitled on motion to a more definite statement. *Abruzzino v. National Fire Ins. Co.* (D. C.-W. Va.), 26 Fed. Supp. 934.

A motion for a more definite statement of the claim which fails to point out the defects complained of and the details desired is defective and may be dismissed but the court may supply the deficiencies and grant the motion. *Van Dyke v. Broadhurst* (D. C.-Pa.), 27 Fed. Supp. 525.

An allegation charging a conspiracy on the part of those directors of a bank who were in office during a specified period is insufficient as to directors who did not hold office during any part of such period. *Loughman v. Pitz* (D. C.-N. Y.), 29 Fed. Supp. 882.

There is no distinction between a motion for a more definite statement and a motion for a bill of particulars. *United States v. Schine Chain Theatres, Inc.* (D. C.-N. Y.), 31 Fed. Supp. 270; *McElwain v. Wickwire Spencer Steel Co.* (D. C.-N. Y.), 64 Bull. 17, 1 Fed. R. Dec. 177.

A general allegation of negligence without further particulars, in a defense of contributory negligence, is sufficient as a pleading. *Sharp v. Pennsylvania-Reading Seashore Lines* (D. C.-N. J.), 53 Bull. 17, 1 Fed. R. Dec. 16.

Distinction Between Bill of Particulars and Discovery.

In an action against a guarantor of corporate bonds, defendant should not be permitted by motion for more definite statement or for a bill of particulars to obtain the names of the original vendees of the bonds, the consideration paid

therefor, the name of the seller of the bonds to plaintiff, and the consideration paid, and a statement as to whether the plaintiffs knew of the guarantee at the time of their purchase. Such information should be sought under the discovery provisions of the rules. *Bicknell v. Lloyd-Smith* (D. C.-N. Y.), 25 Fed. Supp. 657.

Defendant's motion to make the complaint more definite should be denied if the complaint conforms to the requirements of the rules. Additional particulars, if needed, to enable defendant to prepare its responsive pleading or to prepare for trial, should be obtained by a motion for bill of particulars under Rule 12 (e) or by proceedings for discovery under Rules 26 to 37. *Lost Trail v. Allied Mills* (D. C.-Ill.), 26 Fed. Supp. 98.

The purpose of a more definite statement or a bill of particulars is to define the issues, while the purpose of interrogatories may be to secure proofs. The former become part of the pleadings, while the latter become part of the trial record. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416; *Tully v. Howard* (D. C.-N. Y.), 27 Fed. Supp. 6; *Brinley v. Lewis* (D. C.-Pa.), 27 Fed. Supp. 313; *Massachusetts Bonding & Ins. Co. v. Harrisburg Trust Co.* (D. C.-Pa.), 27 Fed. Supp. 987; *Securities & Exch. Comm. v. Timetrust, Inc.* (D. C.-Cal.), 28 Fed. Supp. 34; *Adams v. Hendel* (D. C.-Pa.), 28 Fed. Supp. 317; *Laugharn v. Zimmelman* (D. C.-Cal.), 28 Fed. Supp. 348; *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386; *National Millwork Corp. v. Preferred Mut. Fire Ins.* (D. C.-N. Y.), 28 Fed. Supp. 952; *Tager v. Goodstein* (D. C.-N. Y.), 29 Fed. Supp. 42; *Ferry-Hallock Co. v. Frost* (D. C.-N. Y.), 29 Fed. Supp. 43; *Moog v. Warner Bros. Pictures* (D. C.-N. Y.), 29 Fed. Supp. 479.

A motion for more definite statement and for a bill of particulars should be overruled if the complaint sets forth a cause of action and the information requested can be ascertained by interrogatories under Rule 33, except that if the matters relate to jurisdiction, the motion should be sustained. *Southern Groc. Stores v. Zoller Brew. Co.* (D. C.-Iowa), 26 Fed. Supp. 858.

The "contention" of a party is made by pleadings and is not a proper subject of

examination by deposition. It may, however, be obtained by a motion for a bill of particulars. *Norton v. Cooper* (D. C.-N. Y.), 27 Fed. Supp. 806.

Production of records and articles for inspection should, technically, be sought under Rule 34, but if such discovery has been attempted by a motion for a bill of particulars, no useful purpose is served by denying it. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

A more definite statement by way of itemizing a claim for "overhead" should not be required since to do so would unduly expand the pleadings. Such information should be elicited by discovery. *Miller Co. v. Hyman* (D. C.-Pa.), 28 Fed. Supp. 312.

Information contained in the public files of the clerk of the court may not be obtained by a bill of particulars. *Laugharn v. Zimmelman* (D. C.-Cal.), 28 Fed. Supp. 348.

Copies of documents may not be procured by a motion for a bill of particulars. *Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co.* (D. C.-Mass.), 29 Fed. Supp. 166.

A bill of particulars as to evidentiary matter not required to enable the moving party to prepare his responsive pleading should be denied. Such information should be sought by discovery. *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. Y.), 30 Fed. Supp. 389.

A party taking depositions should not be required to limit his proof by a bill of particulars. *Welty v. Clute, Jr.* (D. C.-N. Y.), 45 Bull. 4, 1 Fed. R. Dec. 107.

Information Necessary to Prepare Answer.

Motion by defendant for a bill of particulars will not be granted before answer if it does not aid the expeditious disposition of the case and if the complaint states the facts with sufficient particularity to enable the defendant to answer. *Fried v. Warner Bros. Circuit Management Corp.* (D. C.-Pa.), 26 Fed. Supp. 603.

If a motion for a bill of particulars requests information to assist the moving party to prepare for trial as well as that necessary to enable him to prepare his responsive pleading, the court may direct that only those particulars of the latter

class need be supplied. *Tully v. Howard* (D. C.-N. Y.), 27 Fed. Supp. 6.

Motion for bill of particulars should be denied if the moving party fails to point out defects in the pleading to which it is directed which would prevent him from preparing his case for trial. *National Millwork Corp. v. Preferred Mut. Fire Ins. Co.* (D. C.-N. Y.), 28 Fed. Supp. 952.

Even if a party moving for a bill of particulars states that the information is sought for the purpose of enabling him properly to prepare a responsive pleading and to prepare for trial, the motion should be denied if the information sought is properly the subject of interrogatories and a responsive pleading can be prepared without such information. *Mann v. Cadillac Automobile Co. of Boston* (D. C.-Mass.), 29 Fed. Supp. 495.

A bill of particulars should be ordered if the additional information requested is necessary to enable the moving party properly to prepare his responsive pleading. *Randolph v. McCoy* (D. C.-Tex.), 29 Fed. Supp. 978; *Sheehan v. Municipal Light & Power Co.* (D. C.-N. Y.), 57 Bull. 24, 60 Bull. 1, 1 Fed. R. Dec. 70.

The words "to prepare for trial" relate to matters needed by the moving party to frame his pleading and are not intended to enable a party to use a bill of particulars in place of discovery. *United States v. Schine Chain Theatres, Inc.* (D. C.-N. Y.), 31 Fed. Supp. 270.

Only those particulars should be ordered which are necessary for the formulation of a responsive pleading and are not within the knowledge of the moving party. *Kraft Corrugated Containers, Inc. v. Trumbull Asphalt Co. of Delaware* (D. C.-N. J.), 31 Fed. Supp. 314.

A motion to make a pleading more definite and certain by setting forth precise dates of payments alleged therein should be denied, if the information is not essential to the sufficiency of the pleading. If needed before the adverse party can safely plead, the information may be obtained by a bill of particulars. *Nordman v. Johnson City* (D. C.-Ill.), 13 Bull. 18, 1 Fed. R. Dec. 51.

Defendant should be denied leave to take depositions of broad scope before answer for the purpose of securing information to enable him to frame his answer. Such information should be obtained by a more definite statement or a

bill of particulars. *Pirnie v. Andrews* (D. C.-N. Y.), 55 Bull. 8, 1 Fed. R. Dec. 252.

Information Which may be Required.

Plaintiff in an action for conspiracy should be required, on defendants' motion for further particulars, to specify whether alleged defamatory statements were oral or in writing, and, if the latter, to attach copies of the writings, since such discovery may be had under Rule 34, providing for the production of documents and things for inspection. *Muloney v. Federal Reserve Bank* (D. C.-Mass.), 26 Fed. Supp. 148.

Although fraud may not be alleged generally, intent may be so alleged and defendant is not entitled to further particulars as to its own fraudulent intent. See also Rule 9 (b). *E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills* (D. C.-Pa.), 23 Fed. Supp. 236.

Plaintiff required to make complaint more definite and certain by setting forth pertinent dates, from which it may be determined whether or not the claim is barred by the statute of limitations. *Mendola v. Carborundum Co.* (D. C.-N. Y.), 26 Fed. Supp. 359.

Suit was brought by beneficiary of contract. There was a dispute as to whether contract was to be performed in Massachusetts or in New York, since the Massachusetts law did not permit a third party to sue on a contract made for his benefit, while the New York law did. Defendant's motion for bill of particulars stating places where contract was made and was to be performed should be granted. *Mahoney v. Bethlehem Engineering Corp.* (D. C.-N. Y.), 27 Fed. Supp. 865.

In an action for conversion by a prior registered owner of a stock certificate against the present holder, claiming that certificate had been wrongfully delivered to defendant without plaintiff's indorsement, knowledge, or consent, defendant is entitled to a bill of particulars as to the circumstances under which the certificate left the possession of plaintiff and the particulars of the transfer. *Meehan v. Schenley Distillers Corp.* (D. C.-N. Y.), 27 Fed. Supp. 989.

A party should not be required to produce correspondence between its unnamed subsidiaries and its adversary. *Piest v. Tide Water Oil Co.* (D. C.-N. Y.), 27 Fed. Supp. 1021.

In an action in which plaintiff claims wages paid to third persons, defendant is entitled to a more definite statement as to the dates when alleged payments were made. *Miller Co. v. Hyman* (D. C.-Pa.), 28 Fed. Supp. 312.

A motion to make a pleading more definite and certain by setting forth precise dates of payments alleged therein should be denied, if the information is not essential to the sufficiency of the pleading. If needed before the adverse party can safely plead, the information may be obtained by a bill of particulars. See also Rule 12 (e). *Nordman v. Johnson City* (D. C.-Ill.), 13 Bull. 16, 1 Fed. R. Dec. 51.

Defendant in an action on a contract is entitled to a bill of particulars as to whether or not the agreement was in writing and with whom made. *Johnson v. Joseph Schlitz Brew. Co.* (D. C.-Tenn.), 28 Fed. Supp. 650.

In an action for libel, defendant is entitled to a bill of particulars as to what portions of the alleged libelous matter are contended to be false. *Sweeney v. United Feature Syndicate* (D. C.-N. Y.), 29 Fed. Supp. 420.

In an action for damages for the misconduct of the directors of a bank, those defendants who served as directors for only a part of the time referred to, are entitled to a more definite statement of the claim so as to indicate whether the misconduct occurred while they served as directors. *Loughman v. Pitz* (D. C.-N. Y.), 29 Fed. Supp. 882.

One of several defendants in an action to restrain unfair competition is not entitled to a bill of particulars as to whether certain enumerated acts were intended to refer to him, if plaintiff supplies such information at the hearing on the motion. *Coca-Cola Co. v. Marbert Products, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 898.

In an action to restrain unfair competition and for an accounting, defendant is not entitled to a bill of particulars concerning details of unfair advertising with which he is charged. *Coca-Cola Co. v. Marbert Products, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 898.

While a claim for damages for breach of contract may be joined with a claim to set aside a fraudulent conveyance, the new rules have not diminished the allegations necessary to support the latter claim for relief. *Iroquois Oil & Gas Co.*

v. Hollingsworth (D. C.-Ill.), 21 Bull. 8, 1 Fed. R. Dec. 201.

In an action for breach of a construction contract and to set aside a fraudulent conveyance, defendants' motion for a more definite statement should be allowed as to the dates and amounts of extra work; the time, place, and manner of alleged breach of the contract and the time when services were rendered; the conveyance alleged to be fraudulent; and whether plaintiff intends to insist on an interest in leases or the land itself by virtue of the contracts. *Iroquois Oil & Gas Co. v. Hollingsworth* (D. C.-Ill.), 21 Bull. 8, 1 Fed. R. Dec. 201.

A bill of particulars as to a general allegation of fraud may be ordered in view of the requirement that circumstances constituting fraud be stated with particularity. *McCarthy v. Schumacher* (D. C.-N. Y.), 57 Bull. 27, 1 Fed. R. Dec. 8.

An allegation of beneficial ownership of stock by plaintiff in a stockholder's derivative action is a conclusion of law and defendant is entitled to a bill of particulars stating generally the facts under which the beneficial ownership arose and existed. *Sheehan v. Municipal Light & Power Co.* (D. C.-N. Y.), 57 Bull. 24, 60 Bull. 1, 1 Fed. R. Dec. 70.

Motion for More Definite Statement or for Bill of Particulars [Rule 12 (e)].

A more definite statement or a bill of particulars should be denied if the information desired by the moving party can be obtained by interrogatories. *American La France-Foamite Corp. v. American Oil Co.* (D. C.-Mass.), 25 Fed. Supp. 386; *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386; *Coca-Cola Co. v. Marbert Products, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 898; *Randolph v. McCoy* (D. C.-Tex.), 29 Fed. Supp. 978; *Wisconsin Alumni Research Foundation v. Vitamin Technologists, Inc.* (D. C.-Cal.), 56 Bull. 6, 1 Fed. R. Dec. 8.

The provision of Rule 1 that the rules should be construed to secure the just, speedy, and inexpensive determination of actions, does not authorize the use of a bill of particulars to secure disclosure of proof to amplify pleading. See also Rule 1. *Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co.* (D. C.-Del.), 25 Fed. Supp. 598; *Gumbart v. Water-*

bury Club Holding Corp. (D. C.-Conn.), 27 Fed. Supp. 228.

A motion for more definite statement and bill of particulars requesting plaintiff to show how it computed its damages is not proper way to raise the question of jurisdictional amount. *E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills* (D. C.-Pa.), 26 Fed. Supp. 236.

The fact that a bill of particulars has been served does not bar an examination before trial. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416.

In an action removed from a state to a federal court, the statement of claim filed in the state court may properly stand as the complaint under Rule 81 (c) unless the court orders repleading. *Murphy v. E. I. DuPont De Nemours & Co.* (D. C.-Pa.), 26 Fed. Supp. 999.

A bill of particulars does not supersede the complaint but limits it, and makes its allegations more definite and certain. *Abel v. Munro* (D. C.-N. Y.), 27 Fed. Supp. 346.

Motion for more specific statement of affidavit of defense and of counterclaim filed prior to effective date of the rules construed as a motion for a bill of particulars. *Massachusetts Bonding & Ins. Co. v. Harrisburg Trust Co.* (D. C.-Pa.), 27 Fed. Supp. 987.

No answer is required to a bill of particulars. *Piest v. Tide Water Oil Co.* (D. C.-N. Y.), 27 Fed. Supp. 1021.

If the complaint is sufficient as a pleading, more definite or detailed information concerning the claim, if needed, should be obtained by means of discovery. *Securities & Exch. Comm. v. Timetrust, Inc.* (D. C.-Cal.), 28 Fed. Supp. 34.

By moving for a more definite statement or for a bill of particulars, the defendant waives objections to jurisdiction over the person and may not at the same time move to quash the return of service. *Johnson v. Joseph Schlitz Brew. Co.* (D. C.-Tenn.), 28 Fed. Supp. 650.

Pretrial procedure may be used as a substitute for a bill of particulars, after answers are filed and interrogatories answered, for the simplification of the issues and determination of question of necessary amendments. *Deltex Rug Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122.

If a counterclaim is so vague that a reply can not properly be prepared in response thereto, plaintiff is entitled to

a more definite statement of defendant's claim. *Van Dyke v. Broadhurst* (D. C.-Pa.), 29 Fed. Supp. 525.

A bill of particulars should be ordered only to the extent necessary to enable the moving party to prepare his responsive pleading. *Fischback v. Solvey Process Co.* (D. C.-N. Y.), 29 Fed. Supp. 583; *Welty v. Clute, Jr.* (D. C.-N. Y.), 45 Bull. 4, 1 Fed. R. Dec. 107.

In an action on contract for making a survey of more than 200 stores and plants of defendant, a more definite statement of the claim or a bill of particulars showing in detail the services performed should not be ordered since such information is not necessary to enable defendant to plead and all of it may be secured by discovery. *Pearson v. Hershey Creamery Co.* (D. C.-Pa.), 30 Fed. Supp. 82.

Bills of particulars are no longer necessary to prevent surprise at the trial nor to limit or define the issues. Proper use of discovery can prevent surprise. *Pearson v. Hershey Creamery Co.* (D. C.-Pa.), 30 Fed. Supp. 82.

Production of documents may be ordered even if they relate to information already supplied by a bill of particulars. *Bruun v. Hanson* (D. C.-Idaho), 30 Fed. Supp. 602.

The function of a bill of particulars under Rule 12 (e) is not the same as that of the former bill of particulars. *United States v. Schine Chain Theatres, Inc.* (D. C.-N. Y.), 31 Fed. Supp. 270.

Motion for a bill of particulars should be denied if a responsive pleading can be prepared without such information. *Engler v. General Elec. Co.* (D. C.-N. Y.), 32 Fed. Supp. 913.

A party is not entitled to a bill of particulars concerning a defense to which he is not obliged to plead and any further information needed to prepare for trial may be obtained by discovery. *Sharp v. Pennsylvania-Reading Seashore Lines* (D. C.-N. J.), 53 Bull. 17, 1 Fed. R. Dec. 16.

Plaintiff may be ordered to file a bill of particulars although the complaint is complete and although codefendants have been able to answer. *McCarthy v. Schumacher* (D. C.-N. Y.), 57 Bull. 27, 1 Fed. R. Dec. 8.

In an action for conspiracy to violate the antitrust laws, defendants' motion to dismiss the complaint for failure to allege that acts complained of were in re-

straint of interstate commerce, was denied pending service of a bill of particulars which had been previously ordered, since the bill of particulars, which becomes a part of the complaint, might supply the deficiency in this respect. Leave to renew the motion after the bill of particulars has been filed was granted. *Folley Amusement Holding Corp. v. Randforce Amusement Corp.* (D. C.-N. Y.), 63 Bull. 7.

The discovery provisions of the new rules serve the purpose of the bill of particulars under the old equity rules. *McElwain v. Wickwire Spencer Steel Co.* (D. C.-N. Y.), 64 Bull. 17, 1 Fed. R. Dec. 177.

Not Available to Procure Evidence or Names of Witnesses.

In an action for conspiracy to cause the failure of a bank, plaintiff may be directed to furnish bill of particulars naming specific defendants or their agents who participated in the wrongful acts, specifying times and places of events alleged, and naming persons to whom defamatory statements were made, in spite of the fact that the last-mentioned item may incidentally involve a disclosure of witnesses. *Mulloney v. Federal Reserve Bank* (D. C.-Mass.), 26 Fed. Supp. 148.

In a suit for unfair competition in making false representations to the trade concerning the product of the adverse party, a bill of particulars as to the names and addresses of the persons to whom the alleged representations were made, should not be ordered, as to do so would be in effect to require the furnishing of names of witnesses. *Sure-Fit Products Co. v. Med-Vogue Corp.* (D. C.-Pa.), 28 Fed. Supp. 489, 42 U. S. P. Q. 372.

Bills of particulars should be confined to ultimate facts and not extend to evidentiary matters. *Cheney Co. v. Cunningham* (D. C.-Pa.), 29 Fed. Supp. 847; *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (D. C.-N. Y.), 30 Fed. Supp. 389; *Louisiana Farmers Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (D. C.-Ark.), 31 Fed. Supp. 483; *Sharp v. Pennsylvania-Reading Seashore Lines* (D. C.-N. J.), 53 Bull. 17, 1 Fed. R. Dec. 16; *Wisconsin Alumni Research Foundation v. Vitamin Technologists, Inc.* (D. C.-Cal.), 56 Bull. 6, 1 Fed. R. Dec. 8.

A party should not be ordered to serve a bill of particulars which would require him to produce the facts which the opposing party must show to make out a prima facie case. *Frederick W. Huber, Inc. v. Pillsbury Flour Mills Co.* (D. C.-N. Y.), 30 Fed. Supp. 108.

Patent or Copyright Suits.

In a copyright suit, the defendant is not entitled to a bill of particulars to show the derivation of plaintiff's title, or the copyrightability of his label. *Bobbrecker v. Denebeim* (D. C.-Mo.), 25 Fed. Supp. 208, 39 U. S. P. Q. 336.

Defendant in a patent suit moved for a bill of particulars specifying what plaintiff deemed to be patentable in respect of each claim of the patent, specifying the minimum and maximum strength of a chemical named in the claims, and specifying acts which plaintiff contended constituted "authorizing, inducing" of infringement by one defendant on the part of the codefendant. The motion should be denied because the particulars would require either a judicial construction of the claims of the patent or the production of proof. *Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co.* (D. C.-Del.), 25 Fed. Supp. 598.

On motion for more definite statement and bill of particulars in a patent infringement action, plaintiff should not be required to state where it manufactures and where it sells each of its products, nor to set forth every sale, advertisement, and letter of defendant constituting the alleged infringement. *E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills* (D. C.-Pa.), 26 Fed. Supp. 236.

Defendant in a patent suit may be required to serve a bill of particulars as to what patents or publications will be offered in evidence to illustrate the prior state of the art. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

In a patent suit plaintiff is entitled to a bill of particulars as to the particular patents or publications, together with dates thereof, to be relied upon in support of defense of anticipation. The furnishing of such information should, however, be made contingent upon plaintiff's first filing a statement of dates when the invention of the patent in suit was first conceived and disclosed. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

The fact that some of plaintiffs' patents have expired and that the only remedy for their infringement is at law is not a valid objection to a motion for bill of particulars in a suit begun in equity, since to prevent multiplicity of suits all claims should be disposed of in one action. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

Defendant in a patent suit may be required to state in a bill of particulars the names of persons involved in prior use or invention pleaded as a defense, even if such persons may be defendant's witnesses. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651; *Sure-Fit Products Co. v. Med-Vogue Corp.* (D. C.-Pa.), 28 Fed. Supp. 489, 42 U. S. P. Q. 372.

In a patent case, the defendant is entitled to a more definite statement as to whether any of the infringing acts occurred during the period covered by a license. *Holske v. Harder Refrigerator Corp.* (D. C.-N. Y.), 28 Fed. Supp. 344.

In a patent case, the defendant, who is the manufacturer of the device alleged to infringe, is entitled to a bill of particulars identifying the devices alleged to embody the invention, but the plaintiff should have access to defendant's plant and defendant's catalogue in order to make such inspection as would enable him to prepare the bill. *Holske v. Harder Refrigerator Corp.* (D. C.-N. Y.), 28 Fed. Supp. 344.

In a patent suit in which the defendant pleads that plaintiff falsely marked his patented product and falsely advertised it, a bill of particulars may be ordered to produce an example of such marking and such advertising or to state where they may be found. *Sure-Fit Products Co. v. Med-Vogue Corp.* (D. C.-Pa.), 28 Fed. Supp. 489, 42 U. S. P. Q. 372.

In a patent suit for a declaratory judgment, a bill of particulars was ordered on condition that the parties exchange in sealed envelopes the date of invention in respect to any patent which the party will seek to carry back of its filing date. *Ferry-Hallock Co. v. Frost* (D. C.-N. Y.), 29 Fed. Supp. 43.

Plaintiff in a patent suit should not be required to furnish a bill of particulars as to nature of infringement if it appears that defendant has been so secretive in the operation of its machines that neither the public nor the plaintiffs can ascer-

tain specifically the character of devices used by defendant. *Deltex Rug Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122.

The plaintiff in a patent suit may be required, on defendant's motion for a bill of particulars, to state the date of the alleged invention of the design in writing upon which he will rely at the trial, such writing to be placed in a sealed envelope and delivered to the clerk of the court to be opened at the direction of the trial judge. *Bloom v. Titus Blatter & Co.* (D. C.-N. Y.), 18 Bull. 16.

The defendant in a patent suit should not be required to specify by a bill of particulars the number and dates and patentees of patents referred to in his answer and the names of the countries in which they were secured, since he must furnish this information 30 days before trial in compliance with R. S. 4920 (9 F. C. A., Title 35, § 69; U. S. C. A., Title 35, § 69; id U. S. C.) *Bloom v. Titus Blatter & Co.* (D. C.-N. Y.), 18 Bull. 16.

The so-called short form of complaint in patent cases is sufficient under the Federal Rules of Civil Procedure. *Wisconsin Alumni Research Foundation v. Vitamin Technologists, Inc.* (D. C.-Cal.), 56 Bull. 6, 1 Fed. R. Dec. 8.

Order directing a bill of particulars in a patent suit indicating the character of information which may be required. *Rudolph Wurlitzer Co. v. Filben* (D. C.-Minn.), 39 U. S. P. Q. 479.

Ruling on Motion.

Ruling on a motion for a bill of particulars which raises a question as to the sufficiency of the complaint should be deferred pending determination of a motion to dismiss. *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (D. C.-Ark.), 31 Fed. Supp. 483.

The granting or refusal of a bill of particulars rests in the sound discretion of the court. *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (D. C.-Ark.), 31 Fed. Supp. 483.

A bill of particulars will not ordinarily be granted as to matters peculiarly within the knowledge of the moving party. *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (D. C.-Ark.), 31 Fed. Supp. 483.

When May be Filed.

A motion for a bill of particulars may be made only within 20 days after service of the pleading to which the motion is directed and no such motion, directed to the complaint, is permitted after issue joined. *Michels v. Ripley* (D. C.-N. Y.), 26 Fed. Supp. 959; *Tully v. Howard* (D. C.-N. Y.), 27 Fed. Supp. 6.

In action by trustee in bankruptcy for breach of contract to loan money, plaintiff's request for 30 days in which to serve bill of particulars and for permission to state lack of knowledge under oath, in lieu of furnishing some of the particulars should be granted. *Mahoney v. Bethlehem Engineering Corp.* (D. C.-N. Y.), 27 Fed. Supp. 865.

The provision of the new rules that motion for bill of particulars is permitted

only within 20 days after service of preceding pleading should not be applied in an action in which such 20-day period had expired before the effective date of the rules and the party making such motion has filed it within 20 days after the rules became effective. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

A motion for a bill of particulars may not be made after issue is joined, since the only function of a bill of particulars is to enable the moving party to file a responsive pleading. Any further information needed to prepare for trial may be obtained by discovery. *Alropa Corp. v. Heyn* (D. C.-Pa.), 30 Fed. Supp. 668.

212. Order for More Definite Statement.

(Caption.)

This cause came on for hearing on defendant's motion for an order directing plaintiff to file a more definite statement and the court being fully advised in the matter, it is

Ordered, that the plaintiff, within ten days after service of a copy of this order, file and serve a more definite statement of his claim as follows:

1. The written instruments that constitute the chain of plaintiff's title to —.
2. A specification as to whether —.
3. Names and addresses of —, and it is further

Ordered, that in all other respects the motion be and it hereby is denied.

United States district judge.

Date—.

Cross-Reference.

See notes to Forms 205, 211.

213. Motion for Bill of Particulars.

(Caption.)

Defendant (plaintiff) moves the court for an order directing the plaintiff (defendant) to file and serve a bill of particulars with respect to the following matters on the ground that they have not been averred in the complaint (answer) with sufficient particularity to enable defendant (plaintiff) to prepare his answer (reply):

1. —.
2. —.

3. —.

4. —.

 Attorney for defendant (plaintiff).

 Address.

Note.

Motion must point out defects complained of and details desired. *McKenna v. United States Lines, Inc.* (D. C.-N. Y.), 14 Bull. 14.

Cross-Reference.

See notes to Forms 205, 211.

214. Order for Bill of Particulars.

(Caption.)

This cause came on for hearing on defendant's motion for a bill of particulars, and the court having been fully advised in the matter, it is

Ordered, that plaintiff, within ten days after service of a copy of this order, shall file and serve a bill of particulars in the following respects:

1. The date on which the accident referred to in the complaint occurred.
2. The place where said accident occurred.
3. The alleged act of negligence on the defendant's part.
4. Details of the damages claimed in the complaint; and it is further

Ordered, that the second and fourth request for particulars are denied; and it is further,

Ordered, that the time within which the defendant may answer the complaint be and it hereby is extended for the period of — days from and after the filing by the plaintiff of the bill of particulars hereby ordered.

 United States district judge.

Date—.

Source of Form.

This form is based on *Wurlitzer v. Filben* (D. C.-Minn.), 5 Bull. 4.

Cross-Reference.

See notes to Forms 205, 211.

215. Motion to Strike Pleading for Failure to Obey Order for Bill of Particulars.

(Caption.)

Defendant moves the court to strike the complaint herein and to dismiss the action with prejudice for plaintiff's failure for more than ten days to obey the order of this court, dated — —, 19—, directing plaintiff to file and serve a bill of particulars.

 Attorney for defendant.

 Address.

Cross-Reference.

See notes to Forms 205, 211.

216. Order Striking Pleading for Failure to Obey Order for Bill of Particulars.

(Caption.)

This cause came on for hearing on defendant's motion to strike the complaint herein and it appearing to the court that plaintiff has failed for more than ten days to obey the order of this court, dated — —, 19—, directing him to file and serve a bill of particulars and there appearing to be no reasonable cause for such failure, it is

Ordered, that the complaint herein be and it is hereby stricken and dismissed with (without) prejudice.

United States district judge.

Date——.

Cross-Reference.

See notes to Forms 205, 211.

217. Objections to Interrogatories.

(Caption.)

Defendant — objects to the interrogatories served by plaintiff on defendant as follows:

1.

To Interrogatory I on the ground that it relates to matters that are irrelevant, incompetent, and immaterial; and that to answer it would place an unnecessary and unduly onerous burden on this defendant in that it would require him to —.

2.

To Interrogatory II on the ground that —.

3.

To Interrogatory III —.

4.

To Interrogatory IV —.

Attorney for defendant.**Cross-References.**

Other forms concerning interrogatories, Forms 455-463.

See notes to Form 205.

Advisory notes to Rule 33, see Form 455.

Federal Rules of Civil Procedure.

"* * * Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. * * * " Rule 33.

218. Motion to Dismiss, Presenting Defenses of Failure to State a Claim, of Lack of Service of Process, of Improper Venue, and of Lack of Jurisdiction under Rule 12 (b).

(Caption.)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.
3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is an inhabitant thereof.
4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars exclusive of interest and costs.

Signed: _____

Attorney for Defendant.

Address: _____

Notice of Motion

To: _____

Attorney for Plaintiff.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room —, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the — day of —, 193—, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: _____

Attorney for Defendant.

Address: _____

Note: "The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7 (b)."

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 19.

Cross-References.

Motion to dismiss on ground that no claim stated and no real controversy exists, Form 541.

See notes to Forms 205, 221.

219. Order Dismissing Complaint.

(Caption.)

This cause came on for hearing on defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted and plaintiff having been granted in open court leave to file an amended complaint, and said amended complaint having been filed and the parties having agreed that said motion to dismiss should stand against the amended complaint and this court having heard the argument of counsel and being fully advised in the premises, it is,

Ordered, that the motion of defendant to dismiss the amended complaint be and the same is hereby granted and that the amended complaint be and it is hereby dismissed.

United States district judge.

Date——.

Cross-Reference.

See notes to Forms 205, 221.

220. Motion Joining Several Defenses.

(Caption.)

The defendant moves the court as follows:

1. To dismiss the action on the ground that the court lacks jurisdiction over the subject-matter because the amount actually in controversy is less than three thousand dollars (\$3,000) exclusive of interest and costs.
2. To dismiss the action on the ground that the court lacks jurisdiction over the person of the defendant because jurisdiction of this court is not invoked on the ground of diversity of citizenship, and defendant is not a resident of this district, but resides at —— in ——, district of ——.
3. To dismiss the action on the ground of improper venue because the jurisdiction of this court is invoked on the ground of diversity of citizenship and neither the plaintiff nor the defendant resides in this district.
4. To dismiss the action on the ground of insufficiency of process because [state any insufficiency of process].
5. To dismiss the action or in lieu thereof to quash the return of service of summons on the ground that [state any defect in service].

Attorney for defendant.

Address.**Note.**

There should be joined in this motion all of the foregoing defenses, numbered (1) to (5) in Rule 12 (b), which the

moving party cares to assert. See Rule 12 (h).

Cross-Reference.

See notes to Forms 205, 221.

221. Answer Presenting Defenses Under Rule 12 (b).**(Caption.)****First Defense**

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the state of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

Signed: _____

Attorney for Defendant.

Address: _____

Note: "The above form contains the various defenses provided for in Rule 12 (b). The first defense raises the legal sufficiency of the complaint. Its effect is equivalent to a general demurrer or a motion to dismiss.

"The second defense is equivalent to a plea in abatement.

"The third defense is equivalent to an answer on the merits.

"The fourth defense is one of the affirmative defenses provided for in Rule 8 (c).

"The answer also includes a counterclaim and a cross-claim."

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 20.

Cross-References.

See notes to Forms 205, 222.

Advisory notes to Rule 8 (a), see Form 56; Rule 9 (b), see Form 106; Rule 9 (c), see Form 121; Rule 9 (d), see Form 122; Rule 9 (e), see Form 123; Rule 10 (b) (c), see Form 56; Rule 19 (c), see Form 124.

Federal Rules of Civil Procedure.

"A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded." Rule 8 (a).

"A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11." Rule 8 (b).

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Rule 8 (d).

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Rule 9 (b).

"In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Rule 9 (c).

"In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law." Rule 9 (d).

"In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it." Rule 9 (e).

"All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth." Rule 10 (b).

"Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Rule 10 (c).

"In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted." Rule 19 (c).

NOTES OF ADVISORY COMMITTEE TO RULE 8 (b): "1. This rule supersedes the methods of pleading prescribed in U. S. C., Title 19, § 508 (Persons making seizures pleading general issue and proving special matter); U. S. C., Title 35, §§ 40d (Proving under general issue, upon notice, that a statement in application for an extended patent is not true), 69 (Pleading and proof in actions for infringement) and similar statutes.

"2. This rule is, in part, Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn. Prac-

tice Book (1934) §§ 107, 108, and 122; Conn. Gen. Stat. (1930) §§ 5508-5514. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. r. 17-20."

NOTE OF ADVISORY COMMITTEE TO RULE 8 (d): "The first sentence is similar to Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. r. 13, 18; and to the practice in the States."

NOTES TO DECISIONS

Defenses; Form of Denials [Rule 8 (b)].

A denial on the ground that the party is without any knowledge is a sufficient denial. *Caterpillar Trac. Co. v. International Harvester Co.* (C. C. A. 9), 106 Fed. (2d) 769.

A statement in an answer that defendant is unable after reasonable investigation to ascertain whether the facts alleged in the complaint are true is equivalent to a denial of knowledge or information sufficient to form a belief as to the truth of the averments, and, therefore, constitutes a sufficient denial. *Associates Discount Corp. v. Crow*, — App. D. C. —, 110 Fed. (2d) 126; *Nieman v. Long* (D. C.-Pa.), 31 Fed. Supp. 30.

Court is not bound to accept statements in pleadings which are, to the common knowledge of all intelligent people, untrue. *Nieman v. Soltis* (D. C.-Pa.), 24 Fed. Supp. 1014.

A corporation may make its denials on information and belief, since statements in any pleading by a corporation must of necessity be made by an officer who may have no personal knowledge of the matter. *National Millwork Corp. v.*

Preferred Mut. Fire Ins. Co. (D. C.-N. Y.), 28 Fed. Supp. 952.

Denials merely averring that defendant has no knowledge of the allegations in the complaint and which therefore denies the allegations and, if material, demands proof thereof, are insufficient, as the denial must show that the pleader has neither knowledge nor information sufficient to form a belief as to the truth of the allegations. *Jablow v. Agnew* (D. C.-N. Y.), 30 Fed. Supp. 718; *Nieman v. Bethlehem Nat. Bank* (D. C.-Pa.), 32 Fed. Supp. 436; *Squire v. Levan* (D. C.-Pa.), 32 Fed. Supp. 437.

Averments in an answer that defendant is without information sufficient to form a belief as to the truth of certain allegations in the complaint will be given the effect of a denial and should not be stricken out, even if the facts are seemingly within his knowledge. *Nordman v. Johnson City* (D. C.-Ill.), 13 Bull. 3, 1 Fed. R. Dec. 51.

Effect of Failure to Deny [Rule 8 (d)].

Allegations in a petition for a writ of habeas corpus which are not denied in the return to the writ stand admitted. *Hammerer v. Huff* (C. A.-D. C.), 110 Fed. (2d) 113.

222. Answer to Complaint Set Forth in Form 83 with Counterclaim for Interpleader.

(Caption.)

Defense

Defendant admits the allegations stated in paragraph 1 of the complaint; and denies the allegations stated in paragraph 2 to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Signed: _____

Attorney for Defendant.

Address: _____

Note: "Rule 13 (h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants."

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 21.

Cross-References.

See notes to Forms 205, 221.

Advisory notes to Rules 18 (a), 19 (a), 19 (b), see Form 56.

Federal Rules of Civil Procedure.

"A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13 (a).

"A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13 (b).

"A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." Rule 13 (c).

"These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof." Rule 13 (d).

"A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." Rule 13 (e).

"When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." Rule 13 (f).

"A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or

part of a claim asserted in the action against the cross-claimant." Rule 13 (g).

"When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action." Rule 13 (h).

"The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied." Rule 18 (a).

"Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. * * *" Rule 19 (a).

"When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons." Rule 19 (b).

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be

exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. * * *" Rule 22.

NOTE OF ADVISORY COMMITTEE TO RULE 13: "1. This is substantially Equity Rule 30 (Answer — Contents — Counterclaim), broadened to include legal as well as equitable counterclaims.

"2. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. r. 2 and 3, and O. 21, r. r. 10-17; *Beddall v. Maitland*, L. R. 17 Ch. Div. 174, 181, 182 (1881).

"3. Certain states have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark. Civ. Code (Crawford, 1934) §§ 117 (as amended) and 118; N. J. Comp. Stat., (2 Cum. Supp. 1911-1924) tit. 163, § 288; N. Y. C. P. A. (1937) §§ 262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis. Stat. (1935) § 263.14 (1) (c).

"4. Most codes do not expressly provide for a counterclaim in the reply. Clark, *Code Pleading* (1928), p. 486. Ky. Codes (Carroll, 1932) Civ. Pract. § 98 does provide, however, for such counterclaim.

"5. The provisions of this rule respecting counterclaims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For a discussion of federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations in Federal Procedure* (1936), 45 Yale L. J. 393, 410 et seq.

"6. This rule does not affect such statutes of the United States as U. S. C., Title 28, § 41 (1) (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship.

"7. If the action proceeds to judgment without the interposition of a counter-

claim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co., v. American Surety Co.*, 260 U. S. 360 (1922); *Marconi Wireless Telegraph Co., v. National Electric Signalling Co.*, 206 Fed. 295 (E. D. N. Y., 1913); *Hopkins, Federal Equity Rules* (8th ed., 1933), p. 213; *Simkins, Federal Practice* (1934), p. 663.

"8. For allowance of credits against the United States see U. S. C., Title 26, § 1672-1673 (Suits for refunds of internal revenue taxes—limitations); U. S. C., Title 28, §§ 774 (Suits by United States against individuals; credits), 775 (Suits under postal laws; credits); U. S. C., Title 31, § 227 (Offsets against judgments and claims against United States)."

NOTE OF ADVISORY COMMITTEE TO RULE 22: "The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co. v. Kegan et al.*, (D. C. Md., 1938). In *Equity No. 2523*, *Baltimore Daily Record*, Feb.

25, 1938, p. 3. It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

"The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65 (e).

"This rule substantially continues such statutory provisions as U. S. C., Title 38, § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U. S. C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See *Chafee, The Federal Interpleader Act of 1936: I and II* (1936), 45 *Yale L. J.* 963, 1161."

NOTES TO DECISIONS

Additional Parties May Be Brought In [Rule 13 (h)].

Even in the absence of diversity of citizenship, a counterclaim may be maintained against plaintiff for unfair competition arising out of the transactions set forth in the complaint. *Dewey & Almy Chem. Co. v. Johnson* (D. C.-N. Y.), 25 Fed. Supp. 1021.

In a suit by an insurance company to cancel a life insurance policy for fraud, defendant must plead his counterclaim to recover benefits under the policy, if he ever wishes to assert such claim. *Union Cent. Life Ins. Co. v. Burger* (D. C.-N. Y.), 27 Fed. Supp. 554.

In an action by a partnership, a counterclaim may be asserted against the partners in their individual capacities. *Abraham v. Selig* (D. C.-N. Y.), 29 Fed. Supp. 52.

In an action for patent infringement in which defendant interposes a counterclaim for declaratory relief as to another of plaintiff's patents, such counterclaim may be dismissed if plaintiff amends his complaint by including a charge of in-

fringement of the patent referred to in the counterclaim. *Cheney Co. v. Coyle* (D. C.-Pa.), 29 Fed. Supp. 847.

Where in an action in which jurisdiction is based on diversity of citizenship, defendant interposed a counterclaim arising out of the same subject-matter and brought in an additional party defendant to the counterclaim, no diversity of citizenship was required between original and an additional defendant to give court jurisdiction over the counterclaim. *Carter Oil Co. v. Wood* (D. C.-Ill.), 30 Fed. Supp. 875.

Defendant in an action to enforce stockholder's liability may counterclaim for rescission of the purchase of the stock by him and for damages, on the ground that the transaction was brought about as a result of a mistake of law. *Schram v. Lucking* (D. C.-Mich.), 31 Fed. Supp. 749.

In view of Rule 41 (a) which prohibits voluntary dismissals after answer is filed, a counterclaim seeking declaratory relief on the issues involved in the main action is redundant and should be strick-

en. *Stanley Works v. C. S. Mersick & Co.* (D. C.-Conn.), 18 Bull. 20, 1 Fed. R. Dec. 43.

A motion to dismiss a counterclaim on the ground that it demands relief which can not be granted as against the plaintiff should be denied if other forms of relief prayed for are not subject to such an objection. *United States v. Humboldt Lovelock Irr. Light & Power Co.* (D. C.-Nev.), 19 Bull. 10.

In an action for infringement of a patent by an assignee of the claim, a counterclaim for unfair competition should be dismissed in the absence of the owner of the patent who is an indispensable party to such counterclaim. *Forstner Chain Corp. v. Gemex Co.* (D. C.-N. J.), 61 Bull. 7, 1 Fed. R. Dec. 115.

A counterclaim may not be maintained solely for the purpose of preventing plaintiff from dismissing the action, since after answer plaintiff may dismiss only with consent of the court and leave to do so will not be granted except under proper circumstances. *Forstner Chain Corp. v. Gemex Co.* (D. C.-N. J.), 61 Bull. 7, 1 Fed. R. Dec. 115.

Defendant, in an action for declaratory judgment as to validity and infringement of a patent and for unfair competition, may counterclaim for damages for infringement of the patent. *Myers v. Beckman* (D. C.-Okla.), 63 Bull. 17, 1 Fed. R. Dec. 99.

A motion to strike under Rule 12 (f) is not a proper method of raising the question of the sufficiency of a counterclaim or compliance with the rule requiring simplicity of pleading. This should be done by a motion to dismiss. *Myers v. Beckman* (D. C.-Okla.), 63 Bull. 17, 1 Fed. R. Dec. 99.

Compulsory Counterclaims [Rule 13 (a)].

In an action brought by a subcontractor in the name of the United States against the surety on a general contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

When a counterclaim arises out of the same transaction as the main action, it must be set up and the court has jurisdiction even though it would not have

had jurisdiction if the counterclaim were set forth in an independent suit. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

Counterclaim Exceeding Opposing Claim [Rule 13 (c)].

In a patent suit, it is proper to counterclaim for a declaratory judgment to have the patent held invalid and non-infringed. *Dewey & Almy Chem. Co. v. Johnson* (D. C.-N. Y.), 25 Fed. Supp. 1021.

Counterclaim Maturing or Acquired after Pleading.

Defendant, in a patent infringement suit, interposed a counterclaim alleging infringement by plaintiff of a patent under which the former held an exclusive license. Owner of the legal title to the patent involved in the counterclaim was later made a defendant. Thereafter the latter conveyed its interest in the patent to the defendant licensee. Defendant then sought leave to file a supplemental counterclaim alleging infringement of other patents. Under such circumstances, a motion for leave to file a supplemental counterclaim should be denied, as the matters were not covered by original complaint and counterclaim. *Irving Air Chute Co. v. Switlik Parachute & Equipment Co.* (D. C.-N. J.), 26 Fed. Supp. 329, 40 U. S. P. Q. 533.

Cross-Claim against Coparty [Rule 13 (g)].

A cross-claim is not available to enable a nominal defendant in a collusive action to prosecute in the federal court a claim against his codefendant which could otherwise be prosecuted only in a state court, and the cross-claim should be stricken. *Ikeler v. Detroit Trust Co.* (D. C.-Mich.), 30 Fed. Supp. 643.

Failure to assert a cross-claim in an action in a court of a state, the laws of which do not make such cross-claims obligatory, does not bar a subsequent action on the claim which could have been asserted by such cross-claim. *Grodsky v. Sipe* (D. C.-Ill.), 30 Fed. Supp. 656.

Interpleader.

The holder of warehouse receipts sued on a fire insurance policy covering goods

in the warehouse. Defendant insurance company answered with a plea in the nature of a bill of interpleader joining other holders of warehouse receipts as cross-defendants. The trustee in bankruptcy of the estate of the warehouseman also became party defendant claiming that he was entitled to the proceeds of the policy. Judgment was rendered for the trustee before the effective date of the new rules and the insurance company appealed. Judgment should be reversed and on the remand of the case to the district court, the more liberal provisions of Rule 22 with respect to interpleader should be made applicable. *Century Ins. Co. v. First Nat. Bank (C. C. A. 5)*, 102 Fed. (2d) 726.

A surety on a bond who is threatened with multiple claims thereon may maintain an action in the nature of interpleader although he denies liability. *Standard Surety & Casualty Co. v. Baker (C. C. A. 8)*, 105 Fed. (2d) 578, revg. 26 Fed. Supp. 956.

The existence of some interest of the plaintiff in an interpleader falls within procedure rather than substantive law. The interest of the plaintiff does not of itself entitle the defendants to a jury trial. *John Hancock Mut. Ins. Co. v. Kegan (D. C.-Md.)*, 22 Fed. Supp. 326.

The beneficiary of a life insurance policy who had been joined as a claimant in an interpleader action by the insurer was granted summary judgment although he was charged by the other claimants, next of kin of the insured, with having exercised undue influence upon the insured, there being no competent, relevant, or material evidence to support such charges. *Mutual Life Ins. Co. v. O'Donnell (D. C.-Ill.)*, 29 Fed. Supp. 1010.

Omitted Counterclaim.

An intervening defendant in a patent suit may not amend his answer by interposing a counterclaim based on a charge of unfair competition. *Staudé Mfg. Co. v. Berles Carton Co., Inc. (D. C.-N. Y.)*, 31 Fed. Supp. 178.

Permissive Counterclaims [Rule 13 (b)].

Plaintiff by coming voluntarily into a District Court, subjects himself to the

jurisdiction of that court in respect to all possible grounds of counterclaim. *Dewey & Almy Chem. Co. v. Johnson (D. C.-N. Y.)*, 25 Fed. Supp. 1021.

In an action brought by plaintiffs as trustees, the defendant may not file a counterclaim against them in their individual capacities. *Chambers v. Cameron (D. C.-Ill.)*, 29 Fed. Supp. 742.

If plaintiff joins a claim for patent infringement with another claim for relief and voluntarily dismisses the former, the defendant may file a counterclaim for a declaratory judgment concerning the validity of the patents. *Kohloff v. Ford Motor Co. (D. C.-N. Y.)*, 29 Fed. Supp. 843.

In an action for patent infringement commenced before the rules became effective, a counterclaim for damages under the antitrust laws, which is triable of right by a jury, was proper, even though filed before such date, on a motion to dismiss filed before but coming on to be heard after such date. *Stewart-Warner Corp. v. Universal Lubricating Systems, Inc. (D. C.-Pa.)*, 29 Fed. Supp. 846.

By commencing an action, the plaintiff submits himself to the jurisdiction of the court as to any counterclaim. *Stewart-Warner Corp. v. Universal Lubricating Systems, Inc. (D. C.-Pa.)*, 29 Fed. Supp. 846.

A counterclaim was filed prior to effective date of new rules, but a motion to dismiss it came on to be heard subsequently to such date. By that time, a separate action on the claim would have been barred. The propriety of the counterclaim should be determined under the new rules. *Stewart-Warner Corp. v. Universal Lubricating Systems, Inc. (D. C.-Pa.)*, 29 Fed. Supp. 846.

In an action on a bond given in an injunction suit in the state court, in which defendant counterclaims for breach of contract, plaintiff may counterclaim for damages for violation of state antitrust laws. *Warren v. Indian Ref. Co., (D. C.-Ind.)*, 30 Fed. Supp. 281.

An intervening defendant may not interpose a counterclaim not arising out of the same transaction as that involved in the original suit. *Staudé Mfg. Co. v. Berles Carton Co., Inc. (D. C.-N. Y.)*, 31 Fed. Supp. 178.

223. Motion for Leave to Present Counterclaim by Supplemental Pleading.

(Caption.)

Defendant moves the court for leave to file a supplemental answer herein by setting up a counterclaim, a copy of which is hereunto annexed, which was acquired by the defendant after he had served his answer. The ground of this motion is that the claim was not owned by the defendant at the time of filing the original answer herein.

Attorney for defendant.

Address.**Cross-Reference.**

See notes to Forms 205, 222.

224. Motion for Leave to Amend Answer to Set Up Counterclaim.

(Caption.)

Defendant moves the court for leave to amend his answer by setting up the counterclaim, a copy of which is hereunto annexed. The ground of this motion is that the counterclaim was omitted from the original answer herein through excusable neglect, in that [here state specific reason for failure previously to plead counterclaim].

Attorney for defendant.

Address.**Cross-Reference.**

See notes to Forms 205, 221, 222.

225. Denial of Existence of a Corporation.

Defendant denies that plaintiff is a corporation as alleged in the complaint in that [supporting particulars].

Cross-Reference.

See notes to Forms 205, 225.

226. Denial of Assignment of Claim.

Defendant denies that plaintiff is the real party in interest and that the claim set forth in the complaint was ever assigned to plaintiff, in that [supporting particulars].

Cross-Reference.

See notes to Forms 205, 225.

227. Denial That Party is Executor.

Defendant denies that he (plaintiff) is an executor (administrator) of the estate of John Doe, deceased, as alleged in the complaint, in that [supporting particulars].

Cross-Reference.

See notes to Forms 205, 222.

228. Denial of Partnership.

Defendant denies that he and John Doe are partners as alleged in the complaint, in that [supporting particulars].

Cross-Reference.

See notes to Forms 205, 225.

229. Denial of Guardianship.

Defendant denies that plaintiff is the guardian of the infant, AB as alleged in the complaint, in that [supporting particulars].

Cross-Reference.

See notes to Forms 205, 225.

230. Denial of Capacity of Unincorporated Association.

The defendant denies that the plaintiff has capacity to sue in its common name as an unincorporated association under the law of the state of — in which this court is held.

Cross-Reference.

See notes to Forms 205, 225.

231. Denial of Capacity of Receiver to be Sued.

The defendant denies that he may be sued in his capacity as receiver, as the order made by — court, on — —, 19—, by which he was appointed as such receiver enjoined and restrained all persons from bringing any action against him.

Cross-Reference.

See notes to Forms 205, 225.

Federal Rules of Civil Procedure.

"* * * When a party desires to raise an issue as to the legal existence of any party or the capacity of any party

to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Rule 9(a).

CHAPTER 10

AFFIRMATIVE DEFENSES

Form	Form
240. Assumption of risk.	267. Statute of frauds—Promise by executor or administrator.
241. Accord and satisfaction—Amount in dispute.	268. —Relating to lands.
242. —Unliquidated amount.	269. —To pay debt discharged in bankruptcy.
243. Negligence on part of plaintiff.	270. —Sale of goods.
244. Contributory negligence.	271. —Performance not within a year.
245. Discharge in bankruptcy.	272. —Consideration of marriage.
246. Duress.	273. —To answer for debt of another.
247. Illegality.	274. Payment by check which plaintiff failed to present.
248. Injury by fellow servant.	275. Liability limited by contract.
249. Arbitration and award.	276. Act of God.
250. Agreement to arbitrate.	277. Release of surety by alteration of contract.
251. Fraud—Contract procured by fraud.	278. Usury.
252. —Reliance on representations.	279. Tender.
253. Estoppel.	280. Ultra vires of corporation.
254. Failure of consideration—Plaintiff without title to property bargained for.	281. Infancy of defendant.
255. —Destruction of goods prior to delivery.	282. Unconstitutionality of statute.
256. Laches.	283. Champerty or maintenance.
257. License.	284. Assignment colorable for federal jurisdictional purposes.
258. Payment.	285. Waiver.
259. Release.	286. Performance prevented by plaintiff.
260. Res judicata.	287. Adverse possession.
261. Rescission of contract.	288. Rescission.
262. Extension of time of payment.	289. Libel and slander—Truth.
263. Novation—Note given.	290. —Privilege.
264. —Mutual exchange of credits.	291. Release of surety upon alteration of contract.
265. Failure of performance of condition precedent.	292. Election of remedies.
266. Limitation of actions in contract.	293. Statute of limitations.

INTRODUCTION.—Under the provisions of Rule 8 (c) matters constituting an avoidance or an affirmative defense must be pleaded affirmatively. This rule enumerates a number of defenses that must be so pleaded. In the notes following Form 240, Rule 8 (c) is set out together with a number of annotations illustrative of defenses that must be affirmatively pleaded.

On the other hand, misjoinder of parties or causes of action are not considered defenses and consequently may not be pleaded by way of answer.

240. Assumption of Risk.

Plaintiff had knowledge of and assumed the risks incident to the employment, and the injuries alleged to have been sustained by plaintiff arose from and were caused by said risks.

Cross-References.

See notes to Forms 205, 221.

Advisory note to rule 9 (b), see Form 106; Rule 12 (h), see Form 205.

Federal Rules of Civil Procedure.

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Rule 8 (c).

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Rule 9 (b).

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received." Rule 12 (h).

NOTE OF ADVISORY COMMITTEE TO RULE 8 (c): "This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N. Y. C. P. A. (1937) § 242, with 'surprise' omitted in this rule."

NOTES TO DECISIONS**Affirmative Defenses [Rule 8 (c)].**

Contributory negligence must be pleaded as an affirmative defense if the state law treats it as procedural and not substantive. *Bridges v. Dahl* (C. C. A. 6), 108 Fed. (2d) 228; *MacDonald v. Central Vermont R. Co., Inc.* (D. C.-Conn.), 31 Fed. Supp. 298. See on this point *Francis v. Humphrey* (D. C.-Ill.), 25 Fed. Supp. 1, and *Sampson v. Channell* (C. C. A. 1), 110 Fed. (2d) 754.

In an action for commissions on sales, the defense of the statute of frauds should be pleaded as an affirmative defense and may not be raised by motion to dismiss for insufficiency. *Piest v. Tide Water Oil Co.* (D. C.-N. Y.), 27 Fed. Supp. 1020.

The defense of res judicata may not be asserted by motion to dismiss but should be set forth affirmatively in the answer, if the prior adjudication is not disclosed by the complaint. *Holmberg v. Hannaford* (D. C.-Ohio), 28 Fed. Supp. 216.

The defenses of laches and statute of limitations may not be asserted by mo-

tion to dismiss but should be set forth affirmatively in the answer. *Holmberg v. Hannaford* (D. C.-Ohio), 28 Fed. Supp. 216; *Munzer v. Swedish American Line* (D. C.-N. Y.), 30 Fed. Supp. 789; *Baker v. Sisk* (D. C.-Okla.), 11 Bull. 2, 1 Fed. R. Dec. 232.

In an action for damages for price discrimination under the Robinson-Patman Act, the defense of justification is in the nature of a plea in avoidance and should be pleaded affirmatively. *Frederick W. Huber, Inc. v. Pillsbury Flour Mills Co.* (D. C.-N. Y.), 30 Fed. Supp. 108.

A motion to strike an affirmative defense which is not responsive to any charge in the complaint should be sustained. See Rule 12 (f). *Nordman v. Johnson City* (D. C.-Ill.), 13 Bull. 18, 1 Fed. R. Dec. 51.

A general allegation of negligence without further particulars, in a defense of contributory negligence, is sufficient as a pleading. *Sharp v. Pennsylvania-Reading Seashore Lines* (D. C.-N. J.), 53 Bull. 8.

241. Accord and Satisfaction—Amount in Dispute.

Prior to ———, 19—, there was a dispute between plaintiff and defendant as to the amount due on the claim set forth in the complaint and on said date plaintiff agreed to accept from defendant the sum of ——— dollars (\$——) in full satisfaction of said claim, which sum the defendant paid to the plaintiff accordingly.

Cross-Reference.

In connection with this chapter, see notes to Forms 205, 221, 240.

242. ———Unliquidated Amount.

On or about ———, 19—, the plaintiff and the defendant entered into an agreement for the settlement of the claim set forth in the complaint for the sum of ——— dollars (\$——), which said sum the defendant paid to the plaintiff in full satisfaction and discharge of said claim.

243. Negligence on Part of Plaintiff.

Any injuries sustained by plaintiff as set forth in the complaint were caused in whole or in part or were contributed to by his own negligence.

244. Contributory Negligence.

The plaintiff was guilty of contributory negligence.

245. Discharge in Bankruptcy.

On ———, 19—, the District Court of the United States for the ——— District of ———, rendered a decree, granting defendant a discharge in bankruptcy, discharging him from the claim set forth in the complaint.

246. Duress.

The execution and delivery of the instrument referred to in the complaint was obtained from defendant by duress in that [set out circumstances showing the duress].

Cross-Reference.

See Rule 9 (b), and notes thereto, as set out under Form 106.

247. Illegality.

The note referred to in the complaint was executed and delivered in consideration of an alleged debt that arose out of a gambling game in which the parties engaged.

248. Injury by Fellow Servant.

The injuries alleged to have been sustained by plaintiff were not caused by any negligence on the part of the defendant but were solely the result of the negligence of a fellow servant.

249. Arbitration and Award.

On or about ———, 19—, plaintiff and defendant submitted the claim set forth in the complaint to the arbitration of AB, CD, and EF, who, as such arbitrators, made an award, by which they found that there was due plaintiff from defendant the sum of ——— dollars (\$——), which sum the defendant paid to the plaintiff.

250. Agreement to Arbitrate.

On or about ———, 19—, plaintiff and defendant agreed to submit to arbitration the claim set forth in the complaint, but the plaintiff failed and refused so to submit the claim.

251. Fraud—Contract Procured by Fraud.

The execution and delivery of the contract described in the complaint was procured by plaintiff from defendant by fraud in that [here set forth grounds of the fraud].

Cross-Reference.

See Rule 9 (b), and notes thereto, as set out under Form 106.

252. ———Reliance on Representations.

The defendant made the agreement referred to in the complaint solely in reliance on representations by plaintiff that ———. Said representations were false, as plaintiff well knew.

Cross-Reference.

See Rule 9 (b), and notes thereto, as set out under Form 106.

253. Estoppel.

Plaintiff is estopped from prosecuting the claim set forth in the complaint by reason of [here set forth grounds for the estoppel].

254. Failure of Consideration—Plaintiff without Title to Property Bargained For.

The note referred to in the complaint was given in consideration of the transfer of certain property by plaintiff to defendant. The plaintiff had

no title to said property, which in fact belonged to AB who reclaimed same from defendant.

255. —Destruction of Goods Prior to Delivery.

The note referred to in the complaint was given in consideration of the transfer and delivery of certain goods by plaintiff to defendant. The said goods were totally destroyed by fire prior to their delivery to defendant.

256. Laches.

Plaintiff is guilty of laches in that [here state circumstances showing laches].

257. License.

On or about — —, 19—, plaintiff granted to defendant a license to manufacture, use, and sell the devices covered by letters patent No. —, referred to in the complaint, which license was in full force and effect at all times alleged in said complaint.

258. Payment.

Before the commencement of this action, defendant paid to plaintiff the amount alleged to be due on the claim set forth in the complaint.

259. Release.

On or about — —, 19—, in consideration of the sum of — dollars (\$—), then paid to him by defendant, plaintiff released defendant from all liability on the claim set forth in the complaint.

260. Res Judicata.

In an action between the parties heretofore brought in — Court on the same claim as that set forth in the complaint, a final judgment was heretofore rendered for the defendant dismissing the complaint on the merits.

Cross-Reference.

Advisory note to Rule 9 (e), see Form 123.

Federal Rules of Civil Procedure.

"In pleading a judgment or decision of a domestic or foreign court, judicial or

quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it." Rule 9 (e).

261. Rescission of Contract.

Pursuant to an agreement entered into by plaintiff and defendant on or about ———, 19—, the contract referred to in the complaint was rescinded.

262. Extension of Time of Payment.

On or about ———, 19—, plaintiff agreed, for a valuable consideration, to extend the time for the payment of the claim set forth in the complaint for one year from ———, 19—.

263. Novation—Note Given.

On or about ———, 19—, at the plaintiff's request, defendant executed and delivered his promissory note in the sum of ——— dollars (\$——) to John Doe in discharge of the claim set forth in the complaint.

264. ———Mutual Exchange of Credits.

Pursuant to an agreement entered into on or about ———, 19—, by and between plaintiff, defendant and John Doe, defendant paid the sum of ——— dollars (\$——) to the said John Doe who credited a like sum upon the indebtedness of plaintiff to him, which transactions discharged defendant from the obligation set forth in the complaint.

265. Failure of Performance of Condition Precedent.

Plaintiff failed to file the claim referred to in the complaint within 30 days after the occurrence of the loss, as required by the policy of insurance on which the claim is based.

Cross-Reference.

See Rule 9 (c), and notes thereto, as set out under Form 121.

266. Limitation of Actions in Contract.

This action was not commenced within one year after the accrual of the claim referred to in the complaint, as provided by the terms of the policy of insurance on which the claim is based.

267. Statute of Frauds—Promise by Executor or Administrator.

The alleged promise referred to in the complaint is a promise by an executor to answer to damages out of his own estate, which promise was not in writing.

268. —Relating to Lands.

The alleged contract set forth in the complaint was for the sale of lands and was not in writing.

269. —To Pay Debt Discharged in Bankruptcy.

The alleged promise by defendant set forth in the complaint was for the payment of a debt theretofore duly discharged in bankruptcy and was not in writing.

270. —Sale of Goods.

The alleged contract set forth in the complaint was for the sale of goods for the price of fifty dollars (\$50) or more, and was not in writing. Defendant did not accept or receive any part of the goods nor did he give plaintiff anything in earnest to bind the alleged bargain or in part payment for said goods.

271. —Performance Not within a Year.

The alleged agreement set forth in the complaint was not to be performed within one year from the date of the alleged making thereof and was not in writing.

272. —Consideration of Marriage.

The alleged agreement set forth in the complaint was made upon consideration of marriage and was not in writing.

273. —To Answer for Debt of Another.

The alleged agreement referred to in the complaint is a promise to answer for the debt, default, or miscarriage of another person, and was not in writing.

274. Payment by Check Which Plaintiff Failed to Present.

On or about — —, 19—, defendant executed and delivered to plaintiff his check on the — Bank for the sum of — dollars (\$—) in payment of the claim set forth in the complaint. Although defendant had on deposit in said bank a sum of money in excess of the amount of said check, plaintiff neglected to present said check for payment before — —, 19—, when said bank became insolvent and said sum of money on deposit therein has become wholly lost to defendant.

275. Liability Limited by Contract.

The goods referred to in the complaint were delivered by plaintiff to defendant under a contract whereby, for valuable consideration, it was agreed by plaintiff that defendant should not be liable for loss of or damage to said goods in an amount exceeding the sum of — dollars (\$—).

276. Act of God.

The loss of the goods described in the complaint was caused solely by an act of God, to wit: —.

277. Release of Surety by Alteration of Contract.

On or about the date of the maturity of the note referred to in the complaint, for valuable consideration, and without the knowledge or consent of the defendant, plaintiff agreed to an extension of time for payment of said note by the maker thereof for the period of — days.

278. Usury.

The loan referred to in the complaint was made by plaintiff to defendant upon the unlawful agreement between them that defendant would pay to plaintiff interest on said loan at a greater rate than — per centum (—%) per annum.

279. Tender.

On or about — —, 19—, at —, defendant duly tendered to the plaintiff the sum of — dollars (\$—) in payment of the claim set forth in the complaint but plaintiff failed and refused to accept the same. Defendant has ever since remained ready and willing to pay said sum to the plaintiff but plaintiff has refused to accept the same. Defendant has paid said sum into this court in this action to be paid to plaintiff who has received notice of such payment.

280. Ultra Vires of Corporation.

Plaintiff corporation was without power to enter into the contract set forth in the complaint.

281. Infancy of Defendant.

The alleged contract set forth in the complaint is null and void by reason of the infancy of the defendant at the time of the making thereof.

282. Unconstitutionality of Statute.

The statute upon which the claim set forth in the complaint is based is unconstitutional in that it violates the provisions of clause —, Article — of the Constitution of the United States.

283. Champerty or Maintenance.

Plaintiff is an attorney at law, and purchased the claim set forth in the complaint for the sole purpose of bringing an action thereon.

284. Assignment Colorable for Federal Jurisdictional Purposes.

Plaintiff secured the note referred to in the complaint by collusive assignment from AB for the sole purpose of creating diversity of citizenship in order to confer jurisdiction on this court.

285. Waiver.

The alleged breach of the contract referred to in the complaint was waived by plaintiff in that [set forth facts constituting the waiver].

286. Performance Prevented by Plaintiff.

Defendant was ready and willing to perform all of the covenants required to be performed on his part by the contract referred to in the complaint but was obstructed and prevented from doing so by the plaintiff.

287. Adverse Possession.

For more than twenty years preceding the commencement of this action, defendant has been in the actual, peaceable, exclusive, open, notorious, visible, hostile, continuous, and uninterrupted adverse possession of the whole of the property described in the complaint.

288. Rescission.

After the sale of the goods as alleged in the complaint, plaintiff and defendant mutually agreed to rescind the sale and defendant returned said goods to plaintiff in full discharge of the claim set forth in the complaint.

289. Libel and Slander—Truth.

The alleged libelous matter set forth in the complaint is true.

290. —Privilege.

The alleged libelous matter referred to in the complaint was privileged in that [here state facts constituting privilege].

291. Release of Surety upon Alteration of Contract.

The bond referred to in the complaint was given by defendant to secure the performance on the part of John Doe of a contract entered into between the said John Doe and plaintiff and thereafter and without the knowledge or consent of defendant, plaintiff agreed to a material alteration in the terms of the said contract.

292. Election of Remedies.

After the sale to defendant of the goods referred to in the complaint, defendant sold and delivered said goods to John Doe. Thereafter plaintiff brought an action in the — Court against John Doe for damages for conversion of said goods and recovered judgment therein in the sum of — dollars (\$—).

Note.

The foregoing defense is appropriate in an action for rescission.

293. Statute of Limitations.

The right of action set forth in the complaint did not accrue within — years next before the commencement of this action.

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 20.

CHAPTER 11

THIRD-PARTY PRACTICE

Form

- 300. Motion to bring in third-party defendant.
- 301. Order granting leave to serve third party.
- 302. Order denying leave to bring in third-party defendant.

Form

- 303. Ex parte order granting leave to serve third party.
- 304. Third-party summons.
- 305. Third-party complaint.

INTRODUCTION.—Third-party practice is made an inherent part of federal civil procedure by Rule 14 of the Federal Rules of Civil Procedure. Its purpose is to permit a defendant to bring in a third party who is liable on the same claim or who is subject to a liability arising out of the claim on which the suit is based. The procedure to be followed is for the defendant to secure an order of the court for leave, as a third-party plaintiff, to serve a third-party summons and a third-party complaint upon the person proposed to be brought in as a third-party defendant. If defendant has not filed his answer, he may move *ex parte*. After service of the answer, he may proceed only on notice to the plaintiff.

The practice may be invoked against a party who is liable to the defendant for all or a part of the plaintiff's claim, as, for instance, in a case in which the third party is liable for contribution or indemnification or as an insurer of the defendant's liability. *Tullgren v. Jasper* (D. C.-Md.), 27 Fed. Supp. 413; *Crum v. Appalachian Elec. Power Co.* (D. C.-W. Va.), 29 Fed. Supp. 90. It is also proper in cases in which the proposed third-party defendant is not liable over to the original defendant, but is liable directly to the plaintiff on the same claim. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715; *Satink v. Holland* (D. C.-N. J.), 28 Fed. Supp. 67. It is permissible to maintain the third-party complaint jointly as against the third-party defendant and the original plaintiff. The United States is subject to being brought in as a third-party defendant in respect to any claim on which it is originally suable.

If the third-party defendant is not liable over to the original defendant, but is only directly liable to the original plaintiff, it becomes necessary for the original plaintiff to amend his complaint after the third party is brought in so as to assert his claim against such third party.

Whether a separate ground of federal jurisdiction is necessary as between the original defendant and the third-party defendant is a question which, according to the prevailing view, has been answered in the negative. According to the weight of authority, the third-party proceeding is to be regarded as ancillary to the main action and, therefore, a separate ground

for federal jurisdiction is not necessary in order to permit the third-party proceeding to be maintained. *Bossard v. McGwinn* (D. C.-Pa.), 27 Fed. Supp. 412; *Tullgren v. Jasper* (D. C.-Md.), 27 Fed. Supp. 413; *Kravas v. Great Atlantic & Pac. Tea Co.* (D. C.-Pa.), 28 Fed. Supp. 66; *Satink v. Holland* (D. C.-N. J.), 28 Fed. Supp. 67; *Crum v. Appalachian Elec. Power Co.* (D. C.-W. Va.), 29 Fed. Supp. 90; *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757; *Schram v. Roney* (D. C.-Mich.), 30 Fed. Supp. 458.

If any party desires to test the propriety of an order permitting a third party to be brought in, the proper procedure is to move to vacate such order. The third-party defendant has the same standing to make motions and assert defenses as the original defendant. Thus, he may move to dismiss both the original complaint and the third-party complaint.

300. Motion to Bring in Third-Party Defendant.

(Caption.)

Defendant moves for leave to make E. F. a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A hereto attached.

Signed: _____,
Attorney for Defendant C.D.

Address: _____

(Notice of Motion.)

Note: "No notice is necessary if the motion is made before the moving defendant has served his answer."

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Rule 22.

Cross-Reference.

Parties generally, see Form 315 and notes thereto.

Federal Rules of Civil Procedure.

"Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as

provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant." Rule 14 (a).

"When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circum-

stances which under this rule would entitle a defendant to do so." Rule 14 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 14: "Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the federal admiralty courts, and in some American state jurisdictions. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16A, r. r. 1-13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); Pa. Stat. Ann. (Purdon, 1936) tit. 12, § 141; Wis. Stat. (1935) §§ 260.19, 260.20; N. Y. C. P. A. (1937) §§ 193 (2), 211 (a). Compare La. Code Pract. (Dart,

1932) §§ 378-388. For the practice in Texas as developed by judicial decision, see *Lottman v. Cuilla*, 288 S. W. 123, 126 (Tex., 1926). For a treatment of this subject see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936), 45 Yale L. J. 393, 417 et seq.

"Third-party impleader under the conformity act has been applied in actions at law in the federal courts. *Lowry and Co., Inc. v. National City Bank of New York*, 28 F. (2d) 895 (S. D. N. Y., 1928); *Yellow Cab Co. of Philadelphia v. Rodgers*, 61 F. (2d) 729 (C. C. A. 3rd, 1932)."

NOTES TO DECISIONS

When Defendant May Bring in Third Party [Rule 14 (a)].

In an action for personal injuries resulting from an automobile collision, against the driver of one of the cars, the court in the exercise of discretion refused leave to bring in as a third party the driver of the car in which plaintiff was riding, it appearing that plaintiff declined to amend his complaint so as to assert a claim against the third party. *General Taxicab Assn., Inc. v. O'Shea*, — App. D. C. —, 109 Fed. (2d) 671.

Leave to bring in a third party is not a matter of right, but rests in the discretion of the court. *General Taxicab Assn., Inc. v. O'Shea*, — App. D. C. —, 109 Fed. (2d) 671; *McPherrin v. Hartford Fire Ins. Co.* (D. C.-Nebr.), 64 Bull. 35, 1 Fed. R. Dec. 88.

In an action for personal injuries resulting from an automobile accident, defendant's motion for leave to serve a summons and complaint on third-party defendants on the ground that the accident was due solely to the negligence of the latter should be granted. Plaintiff's objection that the district wherein the action was pending was not the proper venue of an action against the proposed third-party defendants was overruled, because only the latter are entitled to assert it. *Seemer v. Ritter* (D. C.-Pa.), 25 Fed. Supp. 688.

In an action brought by a subcontractor in the name of the United States

against the surety on a general contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over. See Rules 13 (a) and 24. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

The fact that a counterclaim and a third-party claim interposed by the same defendant are inconsistent with each other is no objection to bringing in the third-party defendant. See Rule 8 (e) (2). *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

In an action for infringement of a patent, a third-party complaint may be maintained for alleged violations of the Clayton Act. Personal service prior to the filing of a third-party complaint is not requisite to jurisdiction over such third-party defendants. Under the Clayton Act jurisdiction can be obtained by service upon them in any district in which they are doing business. *Dewey & Almy Chem. Co. v. Johnson* (D. C.-N. Y.), 25 Fed. Supp. 1021.

A third-party complaint may be maintained jointly against the third-party defendant and the original plaintiff. *Dewey & Almy Chem. Co. v. Johnson* (D. C.-N. Y.), 25 Fed. Supp. 1021.

In an action brought in the western district of Arkansas by a resident of that district against a citizen of Missouri to recover damages caused by an automobile

accident, defendant brought in his insurer, a citizen of Oklahoma, by a third-party complaint. Third-party defendant moved to dismiss third-party complaint for improper venue. The third-party complaint presented a severable controversy and, therefore, in the light of Rule 82 prohibiting construction of the rules so as to extend the venue of actions, the western district of Arkansas was not the proper venue for the third-party proceeding, and hence motion was granted. *King v. Shepherd* (D. C.-Ark.), 26 Fed. Supp. 357.

A workman injured while employed in repair work on a ship elected to sue a third party for negligence rather than receive compensation from his employer under the Longshoremen's and Harbor Workers' Act (10 F. C. A., Title 33, §§ 901 to 950; U. S. C. A., Title 33, §§ 901 to 950; *id.* U. S. C.). Defendant was not entitled to bring in plaintiff's employer by third-party practice. *Calvino v. Farley* (D. C.-N. Y.), 26 Fed. Supp. 431.

Plaintiff may state two alternative causes of action, one against the defendant and the other against a third party who has been brought in as a third-party defendant by the latter; but a judgment for plaintiff against one can not be collected from the other. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

If the claim set out in the third-party complaint might have been asserted against the third-party defendant had he been joined originally as a defendant, he may be brought in as a third-party defendant. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

Third-party practice permits the defendant to bring in a third-party defendant who is liable to either the plaintiff or the defendant. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

Where, in a controversy growing out of an automobile accident, the passenger injured complained against the insurance company that she had abandoned her cause of action against the insured, and against the estate of the deceased driver by reason of promises and representations of defendant, a third-party proceeding by the defendant against plaintiff's attorney for negligent failure to bring suit against the driver's estate until barred by limitations is properly brought,

since the claim could have been asserted by plaintiff. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

If a third-party defendant is brought in by an ex parte order, the better practice for contesting the sufficiency of the third-party complaint is by a motion to vacate the order granting leave to file it and to strike the complaint, rather than by a motion to dismiss the third-party complaint. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715; *McPherrin v. Hartford Fire Ins. Co.* (D. C.-Nebr.), 64 Bull. 35, 1 Fed. R. Dec. 88.

Whether or not the state law provides for contribution as between joint tortfeasors, the defendant in a tort action may bring in a joint tort-feasor as a third-party defendant, as the latter may be liable to the plaintiff. *Crum v. Appalachian Elec. P. Co.* (D. C.-W. Va.), 27 Fed. Supp. 138; *Satink v. Holland* (D. C.-N. J.), 28 Fed. Supp. 67; *Gray v. Hartford Acc. & Indem. Co.* (D. C.-La.), 31 Fed. Supp. 299.

The jurisdictional and venue requirements of an independent action need not be met in a third-party proceeding, since such proceeding is ancillary to the original action. *Crum v. Appalachian Elec. Power Co.* (D. C.-W. Va.), 27 Fed. Supp. 138; *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 29 Fed. Supp. 112; *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757; *Schram v. Roney* (D. C.-Mich.), 30 Fed. Supp. 458; *Gray v. Hartford Acc. & Indem. Co.* (D. C.-La.), 31 Fed. Supp. 299.

In an action in which jurisdiction is based on diversity of citizenship, defendant is not barred from bringing in as third-party defendant, a citizen of the same state as plaintiff. *Crum v. Appalachian Elec. P. Co.* (D. C.-W. Va.), 27 Fed. Supp. 138; *Satink v. Holland Tp.* (D. C.-N. J.), 28 Fed. Supp. 67.

Third-party process may not be served outside of the state in which the action is pending. *F. & M. Skirt Co. v. A. Wimpfheimer & Bro.* (D. C.-Mass.), 27 Fed. Supp. 239.

In an action against the owner of one car for damages for injuries received in an automobile collision, summons and complaint making the driver of the other car a third-party defendant will not be quashed where the suit was properly re-

moved to the federal court by the first defendant, although there is no diversity of citizenship between plaintiffs and the third-party defendant. *Bossard v. McGwinn* (D. C.-Pa.), 27 Fed. Supp. 412.

A third-party claim is merely ancillary to the original action and the fact that the third-party defendant and the plaintiff are citizens of the same state and residents of the same district does not deprive the court of either jurisdiction or venue. *Bossard v. McGwinn* (D. C.-Pa.), 27 Fed. Supp. 412.

The defendant in a personal injury action may bring in his own liability insurer as a third-party defendant, but not the insurer of his codefendant. *Tullgren v. Jasper* (D. C.-Md.), 27 Fed. Supp. 413.

The primary object of this rule is to avoid circuity of action and finally to dispose in one litigation an entire subject-matter arising from a particular set of facts. *Tullgren v. Jasper* (D. C.-Md.), 27 Fed. Supp. 413; *McPherrin v. Hartford Fire Ins. Co.* (D. C.-Nebr.), 64 Bull. 35, 1 Fed. R. Dec. 88.

A third-party defendant may obtain dismissal for insufficiency, as against it, of both the plaintiff's complaint and the third-party plaintiff's complaint. *Duarte v. Christie Scow Corp.* (D. C.-N. Y.), 27 Fed. Supp. 894.

In an action for personal injuries sustained on the sidewalk in front of defendant's store, defendant brought in the owner and mortgagee of the premises as third-party defendants. The latter moved to dismiss on ground that their alleged liability arose out of a contract separate and distinct from plaintiff's claim. The motion should be denied in view of the fact that the third-party defendants are or may be liable to either the defendant or the plaintiff for all or part of plaintiff's claim, and it is immaterial that such liability may be based on a separate contract. *Kravas v. Great A. & P. Tea Co.* (D. C.-Pa.), 28 Fed. Supp. 66.

Following the Pennsylvania practice, in an action for personal injuries pending in a federal court in that state, one of several coplaintiffs was impleaded by defendant as an additional party defendant and, having been found guilty of contributory negligence, was held jointly liable to a coplaintiff. *Dranoff v. Railway Exp. Agency, Inc.* (D. C.-Pa.), 28 Fed. Supp. 325.

A person may not be impleaded as a third-party defendant in an action pend-

ing in a district in which the venue could not be laid in respect to an original action between the third-party plaintiff and such person. *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 29 Fed. Supp. 112.

In an action for damages for death resulting from an airplane accident, the defendant, manufacturer of the plane, was not permitted because of lack of proper venue to implead as third-party defendant a nonresident manufacturer who supplied the alleged faulty part which caused the accident. *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 29 Fed. Supp. 112. Compare with *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757.

Plaintiff may not object to third-party proceeding on the ground that he has no right of action against the proposed third-party defendant. *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 29 Fed. Supp. 112; *Burris v. American Chicle Co.* (D. C.-N. Y.), 29 Fed. Supp. 773.

Person employed on coal conveyor erected adjacent to a railroad was killed by passing train. His estate sued the railroad. The railroad was entitled to bring in the corporation that had erected the conveyor, as such corporation had given the railroad an indemnity agreement against claims for damages caused by such accidents. *Watkins v. Baltimore & O. R. Co.* (D. C.-Pa.), 29 Fed. Supp. 700.

The jurisdictional and venue requirements of an independent action need not be met in a third-party proceeding, since such proceeding is ancillary to the original action. *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757.

Permitting a defendant to bring in a third-party defendant without an independent basis of jurisdiction and without showing independent venue requirements does not constitute an extension of the jurisdiction or venue of the court in contravention of Rule 82. *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757.

Liability of the third-party defendant to the defendant is sufficient to support third-party proceedings without showing direct liability to the plaintiff. Consequently, plaintiff's failure to allege liability of the third-party does not bar

defendant from maintaining third-party proceeding. *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757.

In an action for damages for death occurring in an airplane accident, the defendant transport company was permitted to maintain third-party complaints against the manufacturer of the airplane and the manufacturer of one of the parts, on the theory that defective parts caused the accident. *Morrell v. United Air Lines Transport Corp.* (D. C.-N. Y.), 29 Fed. Supp. 757.

In an action for personal injuries sustained by plaintiff while cleaning windows on defendant's premises, the defendant may bring in a window-cleaning concern with which it had a contract for the performance of the services, it appearing that the defendant claimed the injuries were caused by the neglect of such concern. *Burris v. American Chicle Co.* (D. C.-N. Y.), 29 Fed. Supp. 773.

In an action to recover the benefits under a life insurance policy by the administratrix of the estate of the beneficiary, other contingent beneficiaries to whom the benefits had already been paid, may be brought in as third-party defendants. *Fink v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wisconsin* (D. C.-Mich.), 29 Fed. Supp. 972.

A stevedore sued the owner of a vessel for injuries sustained by him as a result of a defective hatch cover. The defendant sought to bring in as a third-party defendant a stevedoring company by which plaintiff was employed, alleging that it was in control of the hatch and demanded that the third party should be held liable to plaintiff, if any one is. Plaintiff's employer was not liable to plaintiff for damages since the Longshoremen's and Harbor Workers' Compensation Act limits such liability to compensation fixed by the act. The owner of the vessel may bring in plaintiff's employer, however, as a third-party defendant, if he can support a claim against the employer by way of recoupment or indemnity. *Calvino v. Pan-Atlantic Steamship Corp.* (D. C.-N. Y.), 29 Fed. Supp. 1022.

In a negligence action by the purchaser of a confection in which it is alleged that the confection contained a foreign object, the defendant manufacturer may bring in the person who supplied him with the constituent containing the foreign object,

as a third-party defendant. *Saunders v. Southern Dairies, Inc.* (D. C.-D. C.), 30 Fed. Supp. 150.

In an action by a colored school teacher against a county board of education to secure an equalization of salaries paid to white and colored teachers, defendant was not permitted to bring in the state board of education and the county commissioners as third-parties defendant on the ground that there could be no recovery over as against them. *Mills v. Board of Education of Anne Arundel County* (D. C.-Md.), 30 Fed. Supp. 245.

In an action for wrongful death against a third party by a compensation insurance carrier which had paid the award, under its right of subrogation, defendant may bring in the employer of plaintiff's intestate as third-party defendant. *Elliott v. Armour & Co.* (D. C.-S. Car.), 30 Fed. Supp. 367.

In an action to enforce stockholder's liability, the defendant holder of record may bring in his transferee, who is liable to him, without showing an independent basis of federal jurisdiction as between the third-party plaintiff and the third-party defendant. *Schram v. Roney* (D. C.-Mich.), 30 Fed. Supp. 458.

If a third-party defendant is brought in on the ground that he is primarily liable to plaintiff, but the latter declines to amend his complaint so as to pray for relief against the third-party defendant, the order granting leave to bring in the third party should be vacated. *Satink v. Holland Tp.* (D. C.-N. J.), 31 Fed. Supp. 229.

In an action for personal injuries resulting from a collision between an automobile and a truck, in which a passenger of the automobile, who was the wife of the driver and owner thereof, sued the liability insurance carrier of the truck owner, defendant impleaded the plaintiff's husband and his liability insurance carrier alleging that the accident was due solely to his negligence and, in the alternative, that the drivers of the two vehicles were joint tort-feasors. *Gray v. Hartford Acc. & Indem. Co.* (D. C.-La.), 31 Fed. Supp. 299.

Rule 14 precludes a right of election of defendants in the original plaintiff. The defendant may bring in parties primarily liable to plaintiff, irrespective of plaintiff's election. *Gray v. Hartford Acc. & Indem. Co.* (D. C.-La.), 31 Fed. Supp. 299.

Privity is not required as between third-party plaintiff and third-party defendant. *Gray v. Hartford Acc. & Indem. Co.* (D. C.-La.), 31 Fed. Supp. 299.

Defendant's right to implead plaintiff's husband as a third-party defendant in an action for personal injuries is not barred by a state procedural rule which denies a wife the right to sue her husband, if the substantive law of the state recognizes the wife's claim for damages resulting from personal injuries as being her property, since the state procedure does not govern federal courts. *Gray v. Hartford Acc. & Indem. Co.* (D. C.-La.), 31 Fed. Supp. 299.

Although the Federal Rules of Civil Procedure contain no provision requiring a nonresident third-party plaintiff to deposit security for costs, the court may order him to do so. *Alderman v. Whelan Drug Co.* (D. C.-D. C.), 15 Bull. 12.

In an action against the surety on a bond, the surety may bring in as third-party defendant, the principal who has agreed to indemnify surety. *United*

States v. United States Fidelity & Guar. Co. (D. C.-Minn.), 63 Bull. 19, 1 Fed. R. Dec. 112.

In an action by a shipper for loss by fire of live stock in transit by common carrier, the defendant insurer was not permitted to bring in as third-party defendant, the insurer of the owner of the feeding station, the burning of which resulted in the loss, it appearing that to do so would complicate the procedure, delay trial of the case, and add to the costs of the litigation. *McPherrin v. Hartford Fire Ins. Co.* (D. C.-Nebr.), 64 Bull. 35, 1 Fed. R. Dec. 88.

When Plaintiff May Bring in Third Party [Rule 14 (b)].

The United States may be made a third-party defendant in respect of a claim as to which congress has waived the immunity of the United States to suit. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

301. Order Granting Leave to Serve Third Party.

(Caption.)

This cause was heard on motion of defendant (plaintiff) (third-party defendant) for leave to serve a summons and third-party complaint herein upon John Doe and it appearing to the court that said defendant (plaintiff) (third-party defendant) is entitled to bring in the said John Doe as a third-party defendant, it is

Ordered, that leave be and it hereby is granted to — the defendant (plaintiff) (third-party defendant) to serve on John Doe a summons and third-party complaint, copies of which are hereunto annexed (annexed to the motion herein).

Date——.

United States district judge.

Cross-Reference.

In connection with Forms 301 to 305, see notes to Form 300.

302. Order Denying Leave to Bring in Third-Party Defendant.

(Caption.)

This cause was heard on defendant's motion for leave to serve a summons and third-party complaint herein upon John Doe, and the court being fully advised, it is

Ordered, that said motion be and it hereby is denied.

Date——.

United States district judge.

303. Ex Parte Order Granting Leave to Serve Third Party.

(Caption.)

The defendant having applied for leave to serve a summons and third-party complaint herein upon John Doe and the court being advised in the premises, it is

Ordered, that leave be and it hereby is granted to the defendant to serve on John Doe a summons and third-party complaint, copies of which are hereunto annexed.

Date——.

United States district judge.**304. Third-Party Summons.**

Exhibit A

District Court of the United States for the
Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff

v.

C. D., Defendant and Third-Party
Plaintiff

v.

E. F., Third-Party Defendant

Summons

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon ——, plaintiff's attorney whose address is ——, and upon ——, who is attorney for C. D., defendant and third-party plaintiff, and whose address is ——, an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

Clerk of Court.

[Seal of District Court]

Dated——

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Rule 22.

305. Third-Party Complaint.

United States District Court for the
Southern District of New York

Civil Action, File Number —

A. B., Plaintiff

v.

C. D., Defendant and Third-Party
Plaintiff

v.

E. F., Third-Party Defendant

} Third-Party complaint

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C".

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D., or upon which A. B. is entitled to recover from E. F. and not from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____,
Attorney for C. D., Third-Party Plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Rule 22.

CHAPTER 12

PARTIES

Form

- 315. Motion by plaintiff for leave to summon additional defendant.
- 316. Order directing plaintiff to summon additional party.
- 317. Motion for summons of additional party defendant.
- 318. Order for summons of additional party.
- 319. Motion for summons of additional party.
- 320. Motion by defendant for summons of additional defendant.
- 321. Order granting leave to summon additional party.
- 322. Motion to add a party defendant.
- 323. Motion by plaintiff in foreclosure to add lienor.
- 324. Order adding party defendant.
- 325. Motion to drop a party defendant.
- 326. Order dropping party defendant.
- 327. Motion for substitution for deceased party.
- 328. Notice of motion.
- 329. Order substituting another for a deceased party.
- 330. Motion by plaintiff's executor to be substituted as party plaintiff.

Form

- 331. Order substituting executor of plaintiff's estate as party plaintiff.
- 332. Motion by defendant's administrator to be substituted as party defendant.
- 333. Order substituting administrator of deceased defendant's estate as party defendant.
- 334. Order of dismissal for failure of substitution for deceased party.
- 335. Suggestion of death of party.
- 336. Motion to allow action to be continued against the representative of an incompetent defendant.
- 337. Order allowing action to be continued against representative of incompetent defendant.
- 338. Motion to substitute transferee of interest.
- 339. Order substituting transferee of interest as party defendant.
- 340. Motion to substitute successor of public officer.
- 341. Order substituting successor of public officer as party defendant.

INTRODUCTION.—The Federal Rules of Civil Procedure preserve the equity distinction between indispensable and necessary parties and, in effect, make it applicable to what were theretofore known as actions at law. The court may order a necessary party to be brought in if such party is subject to the jurisdiction of the court and can be joined without depriving the court of the jurisdiction of the parties before it. Several persons may join as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. Conversely, several persons may be joined as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. It is important to note that a plaintiff or a defendant need not be interested in obtaining or defending against all the relief demanded.

It has been held that several joint tort feasons may be joined as parties defendant in the same action in so far as they are in the jurisdiction of the court, while nonresident joint tort feasons may be omitted. *Wyoga Gas & Oil Corp. v. Schrack* (D. C.-Pa.), 27 Fed. Supp. 35. Persons who are liable on the same written instrument may be joined as defendants in the same action, even though the claims are separate. *National Surety Corp. v. Allentown* (D. C.-Pa.), 27 Fed. Supp. 515. Similarly, parties may be joined as defendants in the same action against whom claims are sought to be asserted in the alternative. *Crim v. Lumbermens Mut. Casualty Co.* (D. C.-D. C.), 26 Fed. Supp. 715.

Misjoinder of parties, either plaintiffs or defendants, is not a defense to the action and, therefore, is not a ground for dismissal. The remedy in such case is to move to drop the party who has been improperly joined. *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103.

A person who is sought to be made an additional party defendant may appear for the purpose of resisting the application. Such action on his part does not constitute an appearance in the action. *Looper v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 121.

A motion to substitute a new party defendant is in effect an attempt to commence a new action. Consequently the Statute of Limitations is not tolled by the institution of the original suit. *Phoenix State Bank & Trust Co. v. Bitgood* (D. C.-Conn.), 28 Fed. Supp. 899.

315. Motion by Plaintiff for Leave to Summon Additional Defendant.

(Caption.)

Plaintiff moves the court for leave to summon John Doe, of —, to appear herein as an additional party defendant, on the ground that the defendant was an agent and servant of the said John Doe; that the acts referred to in the complaint were done by the defendant as such agent and servant, and in the scope of his employment; and the said John Doe is jointly and severally liable with the defendant on account of plaintiff's claim. The said John Doe is an inhabitant of — District —, in which this case is pending, and therefore is subject to the jurisdiction of this court; and is a citizen of the state of —, of which the defendant is a citizen, and therefore can be made a party hereto without depriving this court of jurisdiction of the parties before it.

Attorney for plaintiff.

Address.

(Notice of Motion.)

Cross-References.

Class actions, notes to Form 56, and Form 105, and notes thereto.

Interpleader, Form 222, and notes thereto.

Intervention, Form 350, and notes thereto.

Joinder of necessary parties, Forms 56, 222, and notes thereto.

Omitted parties, Form 124, and notes thereto.

Parties plaintiff and defendant generally, Form 56, and notes thereto.

Permissive joinder of parties, Form 56, and notes thereto.

Third-party practice, Forms 301-305, and notes thereto.

Advisory notes to Rule 19 (b), see Form 56.

Federal Rules of Civil Procedure.

"When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary ap-

pearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons." Rule 19 (b).

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." Rule 21.

NOTE OF ADVISORY COMMITTEE TO RULE 21: "See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16 r. 11. See also Equity Rules 43 (Defect of Parties—Resisting Objection) and 44 (Defect of Parties—Tardy Objection).

"For separate trials see Rules 13 (i) (Counterclaims and Cross-Claims: Separate trials; Separate Judgments), 20 (b) (Permissive Joinder of Parties: Separate Trials), and 42 (b) (Separate Trials, generally) and the note to the latter rule."

NOTES TO DECISIONS

In General.

A motion to dismiss as to one of the plaintiffs on the ground that he is not a proper party will be denied if it raises an issue of fact. *Berke v. United Paperboard Co.* (D. C.-N. Y.), 26 Fed. Supp. 412.

Although there is misjoinder of actions in bringing suit on two notes not involving a common question of law or fact, the action may be severed instead of dismissed. *Federal Housing Administrator v. Christianson* (D. C.-Conn.), 26 Fed. Supp. 419; *Holmberg v. Hannaford* (D. C.-Ohio), 28 Fed. Supp. 216.

In an action filed before the effective date of the rules, a motion filed after such date to join an additional party de-

fendant should be determined under the new rules. *Boysell Co. v. Franco* (D. C.-Ga.), 26 Fed. Supp. 421.

Misjoinder of parties plaintiff is not a defense and, therefore, may not be pleaded in the answer. *Macleod v. Cohen-Erichs Corp.* (D. C.-N. Y.), 28 Fed. Supp. 103.

The author of a literary production should not be joined as a party plaintiff with the copyright proprietor in an action to enjoin infringement of copyright, since the author is not entitled to any part of the recovery. However, such misjoinder is not ground for dismissal of the complaint. *Eliot v. Geare-Marston, Inc.* (D. C.-Pa.), 30 Fed. Supp. 301.

316. Order Directing Plaintiff to Summon Additional Party.

(Caption.)

This cause was heard on defendant's motion for an order directing plaintiff to summon John Doe of — as an additional defendant herein, and the court being fully advised in the premises, it is

Ordered, that plaintiff be and he hereby is directed to summon John Doe of — as an additional defendant in this action and to serve an amended complaint.

Date——.

United States district judge.

Cross-Reference.

In connection with Forms 316 to 327,
see notes to Form 315.

317. Motion for Summons of Additional Party Defendant.

(Caption.)

Defendant moves the court for an order directing that John Doe of — be summoned to appear herein as an additional party defendant on the ground that this action is brought to set aside a conveyance made by defendant to said John Doe and that consequently complete relief can not be accorded between the parties hereto unless said John Doe is made a party defendant herein. [Add statement showing John Doe is subject to jurisdiction of court as to both service of process and venue and can be made a party without depriving the court of jurisdiction of parties before it.]

Attorney for defendant.

Address.

(Notice of Motion.)

318. Order for Summons of Additional Party.

(Caption.)

This cause was heard on motion of the defendant for an order directing that John Doe of — be summoned to appear herein as an additional party defendant, and the court being fully advised in the premises, it is

Ordered, that John Doe of — be summoned as an additional party defendant herein, and that plaintiff serve an amended complaint.

Date——.

United States district judge.

319. Motion for Summons of Additional Party.

(Caption.)

Defendant moves the court for an order directing that John Doe be summoned to appear herein as an additional party defendant, on the grounds that this action is brought to restrain an infringement of a patent, and that subsequently to the commencement of the action defendant con-

veyed to said John Doe the factory in which said infringement is being carried on. The said John Doe is an inhabitant of — District, in which this action is pending, and hence is subject to the jurisdiction of the court.

Attorney for defendant.

Address.

(Notice of Motion.)

320. Motion by Defendant for Summons of Additional Defendant.

(Caption.)

Defendant moves the court for an order directing the plaintiff to summon John Doe of — to appear herein as an additional party defendant, on the ground that if the defendant is liable for the claim set forth in the complaint, he is liable therefor jointly with the said John Doe. [Add statement showing that John Doe is subject to jurisdiction of court as to both service of process and venue and can be made a party defendant without depriving the court of jurisdiction of the parties before it.]

Attorney for defendant.

Address.

(Notice of Motion.)

321. Order Granting Leave to Summon Additional Party.

(Caption.)

This cause was heard on motion of plaintiff for leave to summon John Doe of — to appear herein as an additional party defendant and the court being fully advised in the premises, it is

Ordered, that plaintiff be and he hereby is granted leave to summon John Doe of —, as an additional party defendant herein and to serve an amended complaint.

Date—.

United States district judge.

322. Motion to Add a Party Defendant.

(Caption.)

Plaintiff moves the court for an order adding AB Corporation as a party defendant herein, on the ground that the said AB Corporation is infringing

plaintiff's patent referred to in the complaint in the operation of its plant at —, which is being conducted for it by the defendant, —.

Attorney for plaintiff.

Address.

(Notice of Motion.)

323. Motion by Plaintiff in Foreclosure to Add Lienor.

(Caption.)

Plaintiff moves the court for leave to add AB of — as an additional party defendant herein, on the ground that this is an action to foreclose a mortgage on real property and the said AB claims a lien on the property described in the complaint. [Add statement showing that AB is subject to the jurisdiction of the court as to both service of process and venue and can be made a party without depriving the court of jurisdiction of the parties before it.]

Attorney for plaintiff.

Address.

324. Order Adding Party Defendant.

(Caption.)

This cause was heard on plaintiff's motion for an order adding AB Corporation as a party defendant herein, and the court having heard the arguments of counsel and being fully advised, it is

Ordered, that the AB Corporation be and it hereby is added as a party defendant herein; and is further

Ordered, that plaintiff have leave to serve an amended complaint herein; and it is further

Ordered, that the summons and amended complaint be served on said AB Corporation.

Date—.

United States district judge.

325. Motion to Drop a Party Defendant.

(Caption.)

Defendant John Doe moves the court for an order dropping the said John Doe as a party defendant herein for misjoinder, on the ground that the claim set forth in the complaint against the said John Doe did not arise out of the same transaction, occurrence, or series of transactions or

occurrences as that out of which arose the claim asserted against the other defendant herein.

Attorney for defendant.

Address.

(Notice of Motion.)

326. Order Dropping Party Defendant.

(Caption.)

This cause was heard on motion of defendant John Doe for an order dropping the said John Doe as a party defendant herein, and the court having considered the arguments and briefs of counsel and being fully advised, it is

Ordered, that John Doe be and he hereby is dropped as party defendant herein.

Date_____

United States district judge.

327. Motion for Substitution for Deceased Party.

(Caption.)

Plaintiff moves the court for an order substituting Mary Doe, administratrix of the estate of John Doe deceased, as party defendant herein in place of John Doe, the original defendant, whose death has occurred since the commencement of this action.

Attorney for plaintiff.

Address.

Statutory Reference.

Substitution of administrator or executor, 8 F. C. A., Title 28, § 778; U. S. C. A., Title 28, § 778; id. U. S. C.

Federal Rules of Civil Procedure.

"If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the

service of a summons, and may be served in any judicial district." Rule 25 (a) (1).

NOTE OF ADVISORY COMMITTEE TO RULE 25 (a) (1): "The first paragraph of this rule is based upon Equity Rule 45 (Death of Party—Revivor) and U. S. C., Title 28, § 778 (Death of parties; substitution of executor or administrator). The scire facias procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81 (b). Paragraph two states the content of U. S. C., Title 28, § 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) O. 17, r. r. 1-10."

NOTES TO DECISIONS

In General.

Plaintiff's failure to revive the action against the legal representative of a deceased defendant within the two-year period fixed by Rule 25 (a) must result in

dismissal as against such deceased defendant even though the action is a stockholder's derivative action. *Winkelman v. General Motors Corp.* (D. C.-N. Y.), 30 Fed. Supp. 112.

328. Notice of Motion.

To _____
Attorney for defendant.

Address.

Please take notice that the undersigned will bring the above motion on for hearing before this court at _____ on the _____ day of _____, 19____, at _____ M. or as soon thereafter as counsel can be heard.

Attorney for plaintiff.

Address.

Cross-Reference.

In connection with Forms 328 to 335,
see notes to Form 327.

329. Order Substituting Another for a Deceased Party.

(Caption.)

This cause was heard on plaintiff's motion for substitution of Mary Doe as party defendant for John Doe, deceased, and it appearing to the court that John Doe, original defendant herein, died on _____, 19____, that Mary Doe has been duly appointed administratrix of the estate of John Doe, and that the claim set forth in the complaint was not extinguished by the death of the said John Doe, it is

Ordered, that Mary Doe, administratrix of the estate of John Doe, deceased, be and she hereby is substituted for the said John Doe as party defendant herein, without prejudice to the proceedings already had; and it is further

Ordered, that a copy of the summons and supplemental complaint herein be served on the said Mary Doe.

Date_____.

United States district judge.

330. Motion by Plaintiff's Executor to be Substituted as Party Plaintiff.

(Caption.)

AB moves the court for an order substituting him as party plaintiff herein in place of John Doe, on the grounds that the said John Doe died

on ———, 19—; the said AB is the duly qualified executor of the estate of the said John Doe, deceased; and the cause of action set forth in the complaint survives the said John Doe, deceased.

Attorney for AB.

Address.

(Notice of Motion.)

331. Order Substituting Executor of Plaintiff's Estate as Party Plaintiff.

(Caption.)

This cause was heard on motion of AB for an order substituting him as party plaintiff herein in place of John Doe, deceased, and it appearing to the court that the said John Doe died on ———, 19—, and that the said AB is the duly qualified executor of the estate of John Doe, deceased, it is

Ordered, that AB, as executor of the estate of John Doe deceased, be and he hereby is substituted as party plaintiff herein in place of John Doe, deceased, and granted leave to serve a supplemental complaint.

Date——.

United States district judge.

332. Motion by Defendant's Administrator to be Substituted as Party Defendant.

(Caption.)

AB moves the court for an order substituting him as party defendant herein in place of John Doe, on the grounds that the said John Doe died on ———, 19—, and the said AB has been duly appointed administrator of the estate of the said John Doe, deceased.

Attorney for AB.

Address.

(Notice of Motion.)

333. Order Substituting Administrator of Deceased Defendant's Estate as Party Defendant.

(Caption.)

This cause was heard on motion of AB for an order substituting him as party defendant herein in place of John Doe, deceased, and it appearing to the court that John Doe died on ———, 19—, and that AB is the duly appointed and qualified administrator of the estate of the said John Doe, deceased, it is

Ordered, that AB be and he hereby is substituted as party defendant herein in place of John Doe, deceased, without prejudice to the proceedings heretofore had.

Date_____.

United States district judge.

334. Order of Dismissal for Failure of Substitution for Deceased Party.

(Caption.)

It appearing to the satisfaction of the court, from an inspection of the record herein, that the plaintiff AB died prior to _____, 19—, and that no substitution of a proper or any person as party plaintiff has been ordered, and being fully advised, it is

Ordered, that this action be and the same is hereby dismissed, as provided by Rule 25 (a) of the Federal Rules of Civil Procedure.

Date_____.

United States district judge.

335. Suggestion of Death of Party.

(Caption.)

Plaintiff hereby suggests to the court that AB, one of the defendants in this action, died on _____, 19—, leaving CD as the sole surviving defendant herein.

Attorney for plaintiff.

Address.

Statutory Reference.

Continuing action against surviving parties, 8 F. C. A., Title 28, § 779; U. S. C. A., Title 28, § 779; id. U. S. C.

shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties." Rule 25 (a) (2).

Federal Rules of Civil Procedure.

"In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death

NOTE OF ADVISORY COMMITTEE TO RULE 25 (a) (2): "This rule modifies U. S. C., Title 28, §§ 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.) in so far as they differ from it."

336. Motion to Allow Action to be Continued against the Representative of an Incompetent Defendant.

(Caption.)

Plaintiff moves the court for an order allowing him to continue this action against the guardian of the defendant, CD, on the grounds that on

—, 19—, the — Court of — duly adjudged the said defendant CD incompetent and appointed the said AB as his guardian.

Attorney for plaintiff.

Address.

Cross-Reference.

See notes to Form 315.

subdivision (a) of this rule may allow the action to be continued by or against his representative." Rule 25 (b).

Federal Rules of Civil Procedure.

"If a party becomes incompetent, the court upon motion served as provided in

337. Order Allowing Action to be Continued against Representative of Incompetent Defendant.

(Caption.)

This cause was heard on plaintiff's motion for leave to continue this action against AB, guardian of CD, defendant who has been adjudged incompetent since the commencement of this action, and the court being fully advised in the premises, it is

Ordered, that this action be and hereby is allowed to be continued against AB as guardian of the defendant CD.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 336.

338. Motion to Substitute Transferee of Interest.

(Caption.)

Plaintiff moves the court for leave to substitute AB of — as party defendant herein in place of defendant CD, on the ground that this is an action to remove cloud on title to real property, and since the commencement of this action the said CD has transferred his interest in the said property to the said AB.

Attorney for defendant.

Address.

Federal Rules of Civil Procedure.

"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be

substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule." Rule 25 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 25 (b), (c): "These are a combination

and adaptation of N. Y. C. P. A. (1937) § 83 and Calif. Code Civ. Proc. (Deering, 1937) § 385; see also 4 Nev. Comp. Laws (Hillyer, 1929) § 8561."

NOTES TO DECISIONS

In General.

In a notice of appeal in an action against a bank and its receiver in which there is a change of receivers subsequently to the commencement of the action, the new receiver need not be named as appellee, unless there has been a sub-

stitution of parties. *Myers v. Canton Nat. Bank* (C. C. A. 7), 109 Fed. (2d) 31.

Where a defendant in a patent suit transferred its interests to another, it is properly dismissed as a defendant. *Irving Airchute Co. v. Switlik Parachute & Equip. Co.* (D. C.-N. J.), 26 Fed. Supp. 329.

339. Order Substituting Transferee of Interest as Party Defendant.

(Caption.)

This cause came on for hearing on plaintiff's motion for leave to substitute AB of — as party defendant herein in place of defendant CD, and it appearing to the court that this is an action involving real property, and since the commencement thereof the said CD has transferred his interest in the property to the said AB, it is

Ordered, that plaintiff have leave to substitute the said AB for the said CD as defendant in this action and to serve a supplemental complaint.

Date——.

United States district judge.

Cross-Reference.

See notes to Form 338.

340. Motion to Substitute Successor of Public Officer.

(Caption.)

Plaintiff moves the court for leave to substitute AB as party defendant herein in place of CD, on the ground that this action was commenced as an action against CD in his official capacity as [title of office], since which time the said CD has been succeeded by AB as [title of office].

Attorney for plaintiff.

Address.

Statutory Reference.

Substitution where public officer dies or leaves office, 8 F. C. A., Title 28, § 780; U. S. C. A., Title 28, § 780; id. U. S. C.

Federal Rules of Civil Procedure.

"When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or

any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to

the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected,

unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object." Rule 25 (d).

NOTE OF ADVISORY COMMITTEE TO RULE 25 (d): "With the first and last sentences compare U. S. C., Title 28, § 780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare Ex parte La Prade, 289 U. S. 444 (1933)."

NOTES TO DECISIONS

In General.

An action to escheat land brought by a county attorney on behalf of the state abates if plaintiff ceases to be such county attorney and his successor in office fails to revive the action within six

months thereafter, and should be dismissed. Oklahoma ex rel. Vassar, County Attorney v. Missouri-Kansas-Texas R. Co. (D. C.-Okla.), 29 Fed. Supp. 938.

341. Order Substituting Successor of Public Officer as Party Defendant.

(Caption.)

This cause was heard on motion of plaintiff for leave to substitute AB as party defendant herein for defendant CD, and it appearing to the court that this is an action against the [title of office] in his official capacity, and that since the commencement of this action the said AB has succeeded the said CD as [title], it is

Ordered, that plaintiff have leave to substitute AB for CD as defendant herein and to serve a supplemental complaint.

Date_____.

United States district judge.

Cross-Reference.

See notes to Form 340.

CHAPTER 13

INTERVENTION

Form

- 350. Motion to intervene as a defendant under Rule 24.
- 351. Intervener's answer.
- 352. Motion by subcontractor for leave to intervene in action under the Heard Act.
- 353. Order granting leave to subcontractor to intervene in action under Heard Act.
- 354. Intervener's complaint for labor under Heard Act.
- 355. Motion for leave to intervene as of right.
- 356. Motion to intervene by claimant in action to quiet title.
- 357. Motion by lienholder to intervene in action to foreclose mortgage.
- 358. Motion to intervene by stockholders in representative action.
- 359. Order granting motion for leave to intervene.
- 360. Notice to attorney-general that constitutionality of statute has been drawn in question.
- 361. Certificate notifying attorney-general of the United States that the constitutionality of an act of Congress is drawn in question.

Form

- 362. Notice that constitutionality of act is drawn in question by answer.
- 363. Order that fact that constitutionality of act is drawn in question be certified.
- 364. Certificate that constitutionality of amendment to bankruptcy law has been drawn in question.
- 365. Notice to attorney-general that constitutionality of an act of Congress is drawn in question.
- 366. Order notifying attorney-general that constitutionality of an act of Congress has been drawn in question.
- 367. Motion of the United States for leave to intervene.
- 368. Intervening petition of the United States.
- 369. Order granting motion of the United States for leave to intervene and to file petition of intervention.

INTRODUCTION.—The distinction between intervention as of right and permissive intervention is recognized by the Federal Rules of Civil Procedure. Intervention of the former class is permitted in any case in which a federal statute confers such a right, in any case in which the applicant may be bound by a judgment in the action and the representation of his interest by existing parties may be inadequate, and in any case in which he is likely to be adversely affected by a disposition of property in the custody of the court. Intervention in the discretion of the court is proper whenever a federal statute confers a conditional right to intervene, or when an applicant's claim or defense and the main action have a common question of law or fact. In the exercise of the discretion of the court in granting or denying leave to intervene, the court considers whether the proposed intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Applications for leave to intervene should be made on notice and may not be presented ex parte. A proposed pleading setting

forth the claim or defense in respect to which the intervention is sought, should accompany the application.

350. Motion to Intervene as a Defendant under Rule 24.

District Court of the United States for the Southern District of New York
Civil Action, File Number —

A. B., Plaintiff

v.

C. D., Defendant

E. F., Applicant for Intervention

Motion to Intervene as
a Defendant

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.

Signed: _____,

Attorney for E. F., Applicant for Intervention.

Address: _____

(Notice of Motion.)

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 23.

Cross-References.

Parties generally, Form 315, and notes thereto.

Third-party practice, Forms 300-305.

Statutory Reference.

Intervention by United States when constitutionality of any act of Congress is in issue, see 8 F. C. A., Title 28, § 401; U. S. C. A., Title 28, § 401; id. U. S. C., as it appears in the notes to Form 360.

Federal Rules of Civil Procedure.

"Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or

other disposition of property in the custody of the court or of an officer thereof." Rule 24 (a).

"Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24 (b).

"A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof

is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, § 1." Rule 24 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 24: "The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

"U. S. C., Title 28:

§ 45a (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)

§ 48 (Suits to be against United States; intervention by United States)

§ 401 (Intervention by United States; constitutionality of federal statute)

"U. S. C., Title 40:

§ 276a-2(b) (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

"Compare with the last sentence of Equity Rule 37 (Parties Generally—Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42

(Claims Against Proceeds in Registry). See generally Moore and Levi, *Federal Intervention: I The Right to Intervene and Reorganization* (1936), 45 Yale L. J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen. Code Ann. (Page, 1926) § 11263; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89-522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo. Stat. Ann. (1935) Code Civ. Proc. § 22; La. Code Pract. (Dart, 1932) Arts. 389-394; Utah Rev. Stat. Ann. (1933) § 104-3-24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) §§ 181, 182, 183 (2) (divorce); *In Re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497 (receivership); *Wilson v. Church*, 9 Ch. D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (non-joinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur v. Krupp*, 9 Ch. D. 351 (1878) (persons out of the jurisdiction)."

NOTES TO DECISIONS

Intervention of Right [Rule 24 (a)].

The Securities and Exchange Commission may be permitted to intervene in an arrangement proceeding under chapter XI of the Bankruptcy Act for the sole purpose of objecting to the jurisdiction of the court over the proceeding under that chapter and thereby relegating the corporation to a chapter X proceeding. *Securities & Exch. Comm. v. United States Realty and Imp. Co.*, 310 U. S. 434, 84 L. ed. —, 60 Sup. Ct. 1044.

Petition for intervention may not ordinarily be made in an appellate court since if the judgment is affirmed it will not be an adjudication of petitioner's rights and if the judgment is reversed, petitioner may seek intervention in the district court. *Morin v. Stuart* (C. C. A. 5), 112 Fed. (2d) 585.

In an action by the United States to recover on a bond to hold the govern-

ment harmless of liability for the use of any patent embodied in certain lifeboats purchased by the government, the president of the vendor company who had agreed to indemnify the defendant surety company is a proper person to intervene and his application for permission to do so under this rule was granted. *United States v. Lane Lifeboat Co.* (D. C.-N. Y.), 25 Fed. Supp. 329.

In a derivative suit by stockholders in behalf of the corporation, other stockholders may not intervene as of right as parties plaintiff, in the absence of a showing that representation of petitioners' interest is or may be inadequate. *Tachna v. Insuranshares Corp.* (D. C.-Mass.), 25 Fed. Supp. 541.

Where a motion for leave to intervene was argued and submitted prior to the effective date of the federal rules of civil procedure, it should be decided under

the old rules. *Dolcater v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 25 Fed. Supp. 637.

In an action brought by a subcontractor in the name of the United States against the surety on a general contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over. *United States ex rel. Foster Wheeler Corp. v. American Surety Co.* (D. C.-N. Y.), 25 Fed. Supp. 700.

An application for leave to intervene is not timely if made more than two and one-half years after occurrence of events of which applicant seeks to complain and after considerable money was expended in carrying out the transactions, of all of which applicant had notice. *United States v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 116.

Intervention of right may not be allowed if the applicant would not be bound by a judgment in the main action. *United States v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 116.

In order to entitle a person to intervene of right, his interest in the property in the custody of the court should be a legal interest. Corporate stock in the hands of a trustee to enforce judgment directing disposition of the stock by its owner is not in the custody of the court. *United States v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 116.

If the claims of the applicant for leave to intervene depart from the field of litigation open to the original parties to such an extent as seriously to complicate and delay the determination of the main action, such application for leave to intervene should be denied. *United States v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 116.

A private person may not intervene in an antitrust action by the United States if the latter does not consent to such intervention. *United States v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 27 Fed. Supp. 116.

In an action by the United States to compel defendant to divest itself of stock of another corporation, another shareholder of the latter corporation will not be so adversely affected by the disposition of defendant's shares as to entitle it to intervention of right. *United*

States v. Columbia Gas & Elec. Corp. (D. C.-Del.), 27 Fed. Supp. 116.

In an action by a trustee for bondholders, an application by a bondholder for leave to intervene for the purpose of taking an appeal from a decree confirming a sale of the corporate property was denied on the ground as not timely, in view of the fact that it was filed five weeks after entry of decree and after an appeal had been taken. *Baltimore Trust Co. v. Interocean Oil Co.* (D. C.-Md.), 30 Fed. Supp. 484.

Petition for intervention after decree should not be granted except under unusual circumstances. *Baltimore Trust Co. v. Interocean Oil Co.* (D. C.-Md.), 30 Fed. Supp. 484.

The Securities and Exchange Commission should not be granted leave to intervene in a proceeding for an arrangement under chapter XI of the Bankruptcy Act for the purpose of obtaining a determination of the question whether the debtor corporation should have proceeded under chapter X for corporate reorganization, in which event the commission would have express statutory right to intervene. In *re Credit Service, Inc.* (D. C.-Md.), 30 Fed. Supp. 878. But see *Securities and Exch. Comm. v. United States Realty & Imp. Co.*, 310 U. S. 434, 84 L. ed. —, 60 Sup. Ct. 1044.

An intervening defendant in a patent suit may not amend his answer by interposing a counterclaim based on a charge of unfair competition. *Staudt Mfg. Co. v. Berles Carton Co., Inc.* (D. C.-N. Y.), 31 Fed. Supp. 178.

Attorney under a contingent fee agreement does not have sufficient interest to support a motion to intervene in opposition to a proposed stipulation of dismissal executed by all of the parties. *Culmerville Coal Co. v. Downing* (D. C.-Ohio), 8 Bull. 10.

Permissive Intervention [Rule 24 (b)].

It is a proper exercise of discretion to deny to a judgment creditor of a railroad company in receivership leave to intervene for the purpose of asking discharge of receivers and termination of the receivership, if it appears that such intervention would delay or prejudice the adjudication of the rights of the original parties. *Carpenter v. Wabash R. Co.* (C. C. A. 8), 103 Fed. (2d) 996.

The Equity Rules rather than the Federal Rules of Civil Procedure are ap-

plicable in determining whether intervention was properly allowed in a case in which judgment was rendered prior to the effective date of the Federal Rules of Civil Procedure, even though an appeal is heard subsequently. *United States v. United States Fidelity & Guaranty Co.* (C. C. A. 10), 106 Fed. (2d) 804.

In a derivative stockholders' suit in Massachusetts against a Delaware corporation and its directors who are Massachusetts citizens, Massachusetts stockholders should not be permitted to intervene as parties plaintiff in view of the possibility that such intervention may deprive the court of jurisdiction and in the absence of a showing that representation of petitioners' interest is or may be inadequate. *Tachna v. Insuranshares Corp.* (D. C.-Mass.), 25 Fed. Supp. 541.

In an action by the guardian and next friend of infant beneficiaries under a will to recover alleged excessive commissions paid to executors, the application of the mother of the infants, who was also an executrix, to intervene in her capacity as an executrix should be granted, but only on condition that she also intervene as an individual and be aligned as a party defendant. *Dolcater v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 25 Fed. Supp. 637.

An injured employee receiving compensation under an employees' compensation act brought suit for negligence against third party. The applicable state law accorded a right of subrogation to the compensation insurance carrier. The insurance carrier should be permitted to intervene as party plaintiff in the action for negligence. *Sloan v. Apalachian Elec. Power Co.* (D. C.-W. Va.), 27 Fed. Supp. 108.

In an antitrust action brought by the government, in which a decree is being sought ordering one gas company to divest itself of control of another, the court will not permit intervening complaints raising rate issues to be filed. *United States v. Columbia Gas & Elec. Corp.* (D. C.-Del.), 28 Fed. Supp. 168.

In a stockholder's derivative suit, other stockholders should not be permitted to intervene as parties plaintiff if the interests of all stockholders are amply protected as a result of the pendency of other actions involving the same subject-matter. *Bachrach v. General Inv. Corp.* (D. C.-N. Y.), 29 Fed. Supp. 966.

In an action in which issue was joined and the case calendared for trial on June 8, 1938, plaintiff's motion to join two other parties plaintiff, filed on September 16, 1938, was overruled on the ground that the application was not timely. *Battista v. Capital Transit Co.* (D. C.-D. C.), 5 Bull. 7.

Procedure [Rule 24 (c)].

Upon award of commissioners appointed by the court on condemnation of land for a United States park, intervening claimants should recover the amount of the award, objection to the timeliness of the intervention not being sustained. *United States v. Certain Lands* (D. C.-Ky.), 25 Fed. Supp. 52.

Application by creditor for leave to intervene in bankruptcy proceeding may not be made ex parte, but should be made on notice. *In re Finger Lakes Land Co.* (D. C.-N. Y.), 29 Fed. Supp. 50.

An additional stockholder should not be permitted to intervene in a stockholder's suit in the absence of a showing that applicant has made demand for desired action on officers and directors of the corporation. *Bachrach v. General Inv. Corp.* (D. C.-N. Y.), 29 Fed. Supp. 966.

An application for leave to intervene is defective if not accompanied by a proposed pleading. *Bachrach v. General Inv. Corp.* (D. C.-N. Y.), 29 Fed. Supp. 966.

Defendants' motion to dismiss should be granted in an action in which an indispensable party has been granted permission to intervene as a party plaintiff but failed to file a pleading. *Paasche v. Atlas Powder Co. & DeVilbiss Co.* (D. C.-Ill.), 31 Fed. Supp. 31.

351. Intervener's Answer.

District Court of the United States for the Southern District of New York
Civil Action, File Number —

A. B., Plaintiff

v.

C. D., Defendant

E. F., Intervener

Intervener's answer

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letters Patent to plaintiff.

Second Defense

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervenor on January 5, 1920.

Signed: _____,

Attorney for E. F., Intervener.

Address: _____.

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 23.

Cross-Reference.

In connection with Forms 351 to 360, see notes to Form 350.

352. Motion by Subcontractor for Leave to Intervene in Action under the Heard Act.

(Caption.)

* AB moves for leave to intervene as a plaintiff in this action to assert the claim set forth in his proposed complaint, of which a copy is hereto attached, on the ground that he furnished labor to the defendant contractor, for which he has not been paid, in the construction of the public building referred to in the complaint, and that the accrued payments withheld by the United States under the terms of the contract are insufficient to pay said claim [U. S. C., Title 40, § 276a-2(b)].

Attorney for AB, applicant for intervention.

Address.

Statutory Reference.

Intervention to obtain payment withheld from public contracts to pay labor,

9A, F. C. A., Title 40, § 276a-2; U. S. C. A., Title 40, § 276a-2; id. U. S. C.

353. Order Granting Leave to Subcontractor to Intervene in Action under Heard Act.

District Court of the United States

_____ District of _____

United States of America, for the
use of John Doe,

Plaintiff,

AB, Applicant for Intervention,

v.

CD Construction Co. and EF Surety
Co.,

Defendants.

Civil No. _____

ORDER

This cause was heard on motion of AB for leave to intervene as a plaintiff in this action in order to assert the claim set forth in his proposed complaint, and the court being fully advised, it is

Ordered, that AB be and he is hereby granted leave to intervene as plaintiff and to serve his complaint herein.

Date_____.

_____ United States district judge.

Cross-Reference.

See notes to Forms 350, 352.

354. Intervener's Complaint for Labor under Heard Act.*

District Court of the United States

_____ District of _____

John Doe,

Plaintiff,

AB,

Intervener,

v.

Roe Construction Co. and CD Surety
Co.,

Defendants.

Civil No. _____
Intervener's Complaint

1. The action arises under the Act of Aug. 30, 1935, 49 Stat. 1012 (U. S. C., Title 40, § 276a), as hereinafter more fully appears.

2. On or about _____, 19—, defendant Roe Construction Co., entered into a contract with the United States for the construction of a post-office building at _____, and executed and delivered to the United States a bond in the sum of _____ dollars (\$—), on which said defendant was principal and defendant CD Surety Co. was surety. The said bond was

conditioned upon the prompt payment of all persons supplying labor and materials in the prosecution of the work provided for in said contract.

3. In the construction of said post-office building, defendant Roe Construction Co. employed intervener as a carpenter and owes intervener the sum of — dollars (\$—) for work and labor furnished by intervener to the defendant Roe Construction Co. between — —, 19—, and — —, 19—.

Wherefore, intervener demands judgment against defendants for the sum of — dollars (\$—), with interest from — —, 19—, and costs.

Attorney for intervener.

Address.

Cross-Reference.

See notes to Forms 350, 352.

355. Motion for Leave to Intervene as of Right.

(Caption.)

The AB Company moves for leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, copy of which is hereto annexed, on the ground that the applicant has insured the defendant herein against the liability asserted in the complaint (or set forth other appropriate facts); that the representation of the applicant's interest by the defendant is inadequate; and that the applicant may be bound by a judgment in the action.

Attorney for the AB Company.

Address.

(Notice of Motion.)

356. Motion to Intervene by Claimant in Action to Quiet Title.

(Caption.)

EF moves for leave to intervene as a defendant herein in order to assert the defenses set forth in his proposed answer, of which a copy is hereto annexed. The grounds of this motion are that this action is brought to quiet the plaintiff's alleged title to the property described in the complaint; that in fact AB has title to said property and seeks to secure an adjudication to that effect.

Attorney for EF, applicant for intervention.

Address.

(Notice of Motion.)

357. Motion by Lienholder to Intervene in Action to Foreclose Mortgage.

(Caption.)

EF moves for leave to intervene as a defendant herein in order to assert the defenses set forth in his proposed answer, of which a copy is hereto annexed, on the ground that this action is brought to foreclose a mortgage on property described in the complaint; that the property is in custody of the court by its receiver; that EF has a lien on said property superior and paramount to that of any of the defendants herein; and that his rights may be adversely affected by a disposition of the property.

Attorney for EF, applicant for intervention.

Address.

(Notice of Motion.)

358. Motion to Intervene by Stockholders in Representative Action.

(Caption.)

EF moves for leave to intervene as a plaintiff in this action, on the ground that this action is a representative suit brought by plaintiff as a stockholder of XY Corporation in behalf of said corporation and in behalf of himself and other stockholders similarly situated; and that the applicant is such a stockholder, and was such at the time of the transaction of which the plaintiff complains, having been continually since — —, 19—, and being now the holder and owner of — shares of the stock of said corporation.

Attorney for EF, applicant for intervention.

Address.

(Notice of Motion.)

359. Order Granting Motion for Leave to Intervene.

(Caption.)

This cause was heard on application of AB for leave to intervene as party defendant herein, and the court having considered the arguments of counsel and being advised in the premises, it is

Ordered, that AB be and he hereby is granted leave to intervene herein as party defendant.

United States district judge.

Date—.

360. Notice to Attorney-General That Constitutionality of Statute Has Been Drawn in Question.

(Caption.)

To the Honorable —,

Attorney-general of the United States:

I, —, District Judge for the — District of —, do hereby certify that on — —, 19—, the debtor in the above-entitled proceedings filed an answer herein, and that by said answer the constitutionality of an act of Congress, affecting the public interest, is drawn in question, and further that neither the United States nor any agency thereof, nor any officer or employee thereof, is a party to this proceeding; that in particular, said answer in substance alleges that section 126 of the National Bankruptcy Act is an unreasonable, arbitrary, and improper exercise of the power delegated to Congress by article 1, subdivision 8 of the United States Constitution, in that it arbitrarily, unreasonably, and improperly includes within the term "creditor" the holder of a claim solely against a corporation's property, and not against the corporation itself, thus enabling the petitioning creditors herein, who are the holders of certificates of participation in a mortgage covering property allegedly owned by debtor, and which mortgage debtor was never obligated to pay, and payment of which mortgage was not assumed by debtor, to throw the 1934 Realty Corporation into reorganization proceedings, notwithstanding that under a reasonable definition of the term "creditor" the petitioners are not creditors of 1934 Realty Corporation, and said 1934 Realty Corporation is not a bankrupt.

It is further alleged that to enforce section 126 of the National Bankruptcy Act would be to work a deprivation of the 1934 Realty Corporation's property without due process of law, thereby rendering said section 126 of the National Bankruptcy Act repugnant to article 5 of the Amendments to the United States Constitution.

Pursuant to the Act of Aug. 24, 1937, ch. 754, § 1, 50 Stat. 751, and on motion to the court, it is

Ordered, that the United States be and hereby is permitted to intervene, and to become a party to this proceeding, to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of section 126 of the National Bankruptcy Act.

Date—.

United States district judge.**Statutory Reference.**

Section 1 of Act of Aug. 24, 1937, 50 Stat. 751 (8 F. C. A., Title 28, § 401; U. S. C. A., Title 28, § 401; id. U. S. C.) reads as follows: "whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the

United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is

otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a

party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such act."

361. Certificate Notifying Attorney-General of the United States that the Constitutionality of an Act of Congress Is Drawn in Question.

Supreme Court of the United States

No. —, — Term, 19—

—, —, and —, et al.,

Appellants,

v.

— Park and Curry Co.

Upon consideration of the appellant's statement as to jurisdiction and the record of this cause, and in view of the Act of Aug. 24, 1937, 50 Stat. 751, the court hereby certifies to the attorney-general of the United States that the constitutionality of section 1 of the Act of Congress of June 11, 1906, 34 Stat. 831 and of section 1 of the Act of Congress of June 2, 1920, 41 Stat. 731 is drawn in question in this cause.

— —, 19—.

[SEAL]

Source of Form.

Collins v. Yosemite Park & C. Co., 304 U. S. 518, 82 L. ed. 1502, 58 Sup. Ct. 1009.

Cross-Reference.

In connection with Forms 361 to 369, see notes to Forms 350, 360.

362. Notice that Constitutionality of Act is Drawn in Question by Answer.

The Honorable,
The Attorney-General,
Department of Justice,
Washington, D. C.

Sir:

Pursuant to the requirement of U. S. C., Title 28, § 401, I hereby certify that in the case of — v. —, No. —, filed in this court on — —, 19—, the constitutionality of the Fair Labor Standards Act of 1938 is drawn in question in the answer filed by the defendant — —, 19—.

The case has been set for trial and will be tried on —, — —, 19—.

Please acknowledge receipt of this letter at your earliest convenience.

Very respectfully yours,

363. Order That Fact That Constitutionality of Act is Drawn in Question be Certified.

District Court of the United States

_____ District of _____

_____ Circuit at _____

_____ ,	} Civil No. _____.	
v.		
_____ Railroad Co.,		
	Plaintiff,	
	Defendant.	

ORDER

It appearing that the answer filed by the defendant in the above-entitled case draws in question the constitutionality of certain portions of the Act of Congress approved June 21, 1934, relating to the National Railroad Adjustment Board [U. S. C., Title 45, § 153 (1)], it is ordered that this fact shall be, and the same is hereby certified to the attorney-general of the United States.

It further appearing that the answer of the defendant attacks the validity of an order and award of the National Railroad Adjustment Board, Second Division, it is further ordered that a copy of such answer be served on said division of said board.

It is further ordered that the clerk of this court shall send by registered mail a copy of such defendant's answer and a copy of this order to the attorney-general of the United States at Washington, D. C., and to the National Railroad Adjustment Board, Second Division, _____ Street, _____, Illinois.

Granted: This _____ day of _____, 19____.

United States district judge.

364. Certificate That Constitutionality of Amendment to Bankruptcy Law has been Drawn in Question.

District Court of the United States

_____ District of _____

_____ Division

In the Matter of the city of _____, _____.	} No. _____ In Bankruptcy. In Proceedings for Composition of Debts Under Sections 81, 82, 83 and 84 of Chapter 9 of Acts of Congress Relating to Bankruptcy.	

CERTIFICATE

To the Honorable: The attorney-general of the United States, Department of Justice, Washington, D. C.

It having been suggested to the court that the constitutionality of the amendment approved June 22, 1938, to ch. 9, of the Bankruptcy Act of the United States, 52 Stat. 939 (U. S. C., Title 11, § 401 et seq.), has been drawn in question in the above-entitled cause by certain creditors and claimants answering in said proceeding and that such question affects the public interest and that under the provisions of the Act of Congress approved Aug. 24, 1937, ch. 754, 50 Stat. 751 (U. S. C., Title 28, §§ 349a, 380a, 401), the same should be certified to the attorney-general.

The court having given consideration to such suggestion and having examined the pleadings in said cause, hereby certifies to the attorney-general that the constitutionality of the amendment aforesaid, has been drawn into question in this cause, and that the United States, if it may so desire, may intervene in this cause in accordance with the provisions of such statutes and to plead or answer as it may be advised.

The court further certifies that said cause having been set down for hearing on the — day of —, 19—, and there not appearing to be sufficient time for the United States to appear, said cause has been continued until the — day of —, 19—, at — M.

Done and ordered in —, —, this — day of —, 19—.

United States district judge.

365. Notice to Attorney-General that Constitutionality of an Act of Congress is Drawn in Question.

The Attorney-General,
Washington, D. C.

Dear Sir:

Pursuant to the requirement of section 1 of the Act of Aug. 24, 1937 50 Stat. 751 (U. S. C., Title 28, § 401), I hereby certify that the constitutionality of the Act of —, 19—, — Stat. — (U. S. C., Title —, § —), has been drawn in question by the answer (complaint) filed —, 19—, in the case of — v. —, now pending in the United States District Court for the — District of —.

Very truly yours,

United States district judge.

366. Order Notifying Attorney-General that Constitutionality of an Act of Congress Has Been Drawn in Question.

District Court of the United States

_____ District of _____

In the Matter of the City of _____, }
 _____, a municipal corporation. }

In Bankruptcy
 No. _____, _____

ORDER

This cause coming on to be heard upon the motion for order preserving exceptions to the master's report and for rereference to the special master, and it appearing to the court that the constitutionality of U. S. C., Title 11, § 403 (j), has been drawn in question in these proceedings and that in accordance with U. S. C., Title 28, § 401, the attorney-general of the United States should be notified of such constitutional question, and the court being further advised in the premises, it is thereupon

Ordered and adjudged, that the exceptions of the various creditors to the master's report are hereby preserved; that that part of the motion re-referring the matter to _____, as special master, is hereby denied; and that the clerk of the court is hereby directed to notify the attorney-general of the United States that the constitutionality of U. S. C., Title 11, § 403 (j) has been drawn in question in these proceedings.

It is further ordered and adjudged, that this matter be heard in _____, _____, on the _____ day of _____, 19____, upon the exceptions to the master's report, without further notice to all parties concerned.

Done and ordered at _____, _____, this _____ day of _____, 19____.

 Judge.

367. Motion of the United States for Leave to Intervene.

(Caption.)

Now comes the United States of America by _____, United States attorney for the _____ District of _____, and says:

On _____, 19____, the city of _____, _____, being a municipality of the state of _____ within the meaning of the provisions of ch. IX of the Acts of Congress relating to bankruptcy, filed its petition in this court for confirmation of a plan for composition of its debts as set out in said petition under the provisions of ch. IX of the Acts of Congress relating to bankruptcy.

On _____, 19____, an order was entered by the court approving the petition as properly filed and providing that claims be filed with _____, special master.

On _____, 19____, _____ filed its answer and objections to the plan of composition submitted by said city of _____, _____.

On ———, 19—, the ——— National Bank of ———, ———, filed its answer and objections to said petition of the city of ———, ———.

On ———, 19—, CR filed his answer to said petition and motion to dismiss said petition.

On ———, 19—, the court entered an order referring the cause to Honorable ——— as special master to make "findings and report the same to this court upon the aforesaid preliminary questions of law raised by the pleadings."

On ———, 19—, said special master filed his report dated ———, 19—, overruling all objections set forth in the answers and motions of all objectors on constitutional ground, and overruling the objections in the answers and motions of ———, the ——— National Bank of ———, ———, and CR, except those portions of such answers as are directed to questions of fact.

Thereafter ———, the ——— National Bank of ———, ———, and CR filed objections and exceptions to the special master's findings and conclusions of law on the ground, among others, that chapter IX of the Acts of Congress [U. S. C., Title 11, § 403 (j)] relating to bankruptcy is unconstitutional and in violation of the Fifth Amendment to the Constitution.

On ———, 19—, the court entered an order directing the clerk of this court to notify the attorney-general that the constitutionality of U. S. C., Title 11, § 403 (j) has been drawn in question in these proceedings, and an attested copy of said order was forwarded by the clerk to the attorney-general.

U. S. C., Title 11, § 403 (j) is an act affecting the public interest, and the United States or any agency thereof or any officer or employee thereof, as such officer or employee, is not a party to the proceedings.

Wherefore, the United States of America moves the court for an order permitting the United States of America to intervene in this cause and become a party thereto for the purposes and with all the rights as provided by the Act of Aug. 24, 1937, Public No. 352, 75th Congress, and that the United States of America as such party be granted leave to file the petition hereto annexed.

United States of America

By ———

United States attorney for
the ——— District of ———.

368. Intervening Petition of the United States.

(Caption.)

Now comes the United States of America by ———, United States attorney for the ——— District of ———, intervenor in this cause, and prays the Court that the objections and exceptions of ———, the ———

National Bank of —, —, and CR to the report of the special master filed herein in so far as such objections and exceptions are based upon the contention that chapter IX of the Acts of Congress relating to bankruptcy [U. S. C., title 11, § 403 (j)] is unconstitutional, be overruled and that said chapter and subsection be held to be a valid exercise of the powers conferred upon the Congress by the Constitution to establish uniform laws on the subject of bankruptcy within the United States.

United States of America

By _____

United States attorney for
the — District of —.

369. Order Granting Motion of the United States for Leave to Intervene and to File Petition of Intervention.

(Caption.)

This cause coming on to be heard this — day of —, 19—, on motion of the United States of America for leave to intervene in the above-entitled cause, and to be made a party thereto, and to file its intervening petition as annexed to said motion, on consideration thereof, it appearing that the United States of America has the right to intervene and to become a party to said cause under the provisions of the Act of Aug. 24, 1937, Public No. 352, 75th Congress, said motion is granted, and the United States of America is hereby made a party to this cause for the purposes and with all the rights as provided by the said Act of Aug. 24, 1937, Public No. 352, 75th Congress, and the said petition of the United States as intervenor may be filed herein.

United States district judge.

CHAPTER 14

AMENDED AND SUPPLEMENTAL PLEADINGS

Form	Form
375. Motion for leave to amend pleading.	383. Motion for leave to serve supplemental pleading.
376. Notice of motion.	384. Notice of motion.
377. Order granting leave to amend pleading.	385. Order granting leave to serve supplemental pleading.
378. Order extending time to amend.	386. Supplemental pleading.
379. Amended pleading.	387. Motion for leave to supplement complaint.
380. Notice of motion for leave to amend complaint.	388. Notice of motion to supplement complaint.
381. Order granting leave to amend complaint.	389. Order granting leave to file supplemental complaint.
382. Order dismissing amended complaint.	

INTRODUCTION.—The rules permit a party to amend his pleading once as of right before the service of a responsive pleading or within twenty days after the service of his pleading if no responsive pleading is permitted, provided the action has not yet been placed on the trial calendar. After the service of a responsive pleading, or if the action has been placed upon the trial calendar, amendment may be made only by leave of court. The amendments relate back to the date of the original pleading unless the purpose of the amendment is to add a new claim which would otherwise be barred by the statute of limitations. Pleadings may be amended at any time to conform to the evidence. While the rules contemplate liberality in respect to amendments of pleadings, certain limitations are necessary. For instance, the complaint in an action for equitable relief may not be amended during the trial by adding a claim of a legal nature, since such procedure would deprive the defendant of a right to demand a jury trial. Supplemental pleadings, setting forth matters occurring subsequently to the date of the original pleading, are also permitted.

375. Motion for Leave to Amend Pleading.

(Caption.)

Plaintiff (defendant) moves the court for leave to serve an amended complaint (answer), a copy of which is hereto annexed.

The grounds of this motion are:

Attorney for the plaintiff (defendant).

Address.

Cross-Reference.

In connection with Forms 375 to 382,
see notes to Form 376.

376. Notice of Motion.

To _____

Attorney for defendant (plaintiff).

Address.

Please take notice, that the undersigned will bring the above motion on for hearing before this court at _____ on the _____ day of _____, 19____, at _____— M. or as soon thereafter as counsel can be heard.

Attorney for plaintiff (defendant).

Address.

Statutory Reference.

Defects in form immaterial, amendment, 8 F. C. A., Title 28, § 777; U. S. C. A., Title 28, § 777; *id.* U. S. C.

Federal Rules of Civil Procedure.

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Rule 15 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 15 (a): "See generally for the present

federal practice, Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U. S. C., Title 28, §§ 399 (Amendments to show diverse citizenship) and 777 (Defects of form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r. r. 1-13; O. 20, r. 4; O. 24, r. r. 1-3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont. Rev. Codes Ann. (1935) § 9186; 1 Ore. Code Ann. (1930), § 1-904; 1 S. C. Code (Michie, 1932) § 493; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading (1928), pp. 498, 509."

NOTES TO DECISIONS**Amendments [Rule 15 (a)].**

While the specific remedy sought in a petition in proceeding to recover on a lost bail bond was a proceeding in scire facias, under this rule it is subject to an amendment substituting a prayer for relief upon the breach of the bond. *Western Surety Co. v. United States* (C. C. A. 9), 100 Fed. (2d) 88.

A complaint demanding equitable relief under a statute authorizing suit either at law or in equity, which fails

to state a good claim for equitable relief but states a good claim for money judgment, may be sustained if amended to demand a money judgment. *Independence Shares Corp. v. Deckert* (C. C. A. 3), 108 Fed. (2d) 51.

After a case has been remanded to the District Court, motion to amend pleadings may be entertained by that court. *Jones v. St. Paul Fire & Marine Ins. Co.* (C. C. A. 5), 108 Fed. (2d) 123.

In a contract action removed from a state into a federal court, plaintiff's motion for judgment declining defendant permission to plead further on the grounds that such further pleading was prohibited by state statute, was denied after the effective date of the rules, the court holding that the federal rules were controlling and that leave to amend pleadings should be freely given when justice so requires. *Moore v. Illinois Cent. R. Co.* (D. C.-Miss.), 24 Fed. Supp. 731.

Order dismissing original petition because an appended exhibit disproved an averment in the petition is not necessarily an adjudication in defendant's favor and motion to strike out an amended pleading subsequently filed should be overruled. *Earhart v. Valerius* (D. C.-Mo.), 25 Fed. Supp. 754.

Following the dismissal of a petition for restitution of alleged profits accruing to a power company during a delay in construction of a competing public power project, which delay was alleged to have been caused by a wrongful suit to enjoin construction of the public project, the county was granted leave to amend its original petition so as to eliminate the theory of unjust enrichment. *Duke Power Co. v. Greenwood County* (D. C.-S. Car.), 25 Fed. Supp. 963.

Although the court lacks jurisdiction to issue a preliminary injunction in a labor dispute, if it appears from the complaint that the Norris-LaGuardia Act (9 F. C. A., Title 29, §§ 101 to 115; U. S. C. A., Title 29, §§ 101 to 115; *id.* U. S. C.) bars such remedy, nevertheless a motion to dismiss should be denied if it also appears that plaintiff can amend his pleading so as to show the necessary jurisdiction. *Rohde v. Dighton* (D. C.-Mo.), 27 Fed. Supp. 149.

Although a party may amend his pleading as a matter of course only within the time prescribed by Rule 15 (a), he may serve an amended pleading after expiration of such time if such amended pleading is accepted by the adverse party without objection. *Buggeln v. Standard Brands* (D. C.-N. Y.), 27 Fed. Supp. 399.

When motion to dismiss is granted, a party may be granted leave to amend, in view of the liberal provision for the amendment under the rules. *Holland v. Majestic Radio & Television Corp.* (D. C.-N. Y.), 27 Fed. Supp. 990.

After plaintiff served reply, defendant was permitted to amend answer by

pleading the statute of limitations. *Downey v. Palmer* (D. C.-N. Y.), 27 Fed. Supp. 993.

A plaintiff in an action for equitable relief should not be permitted to amend his complaint at the trial by including a claim of a legal nature, as he would thereby deprive the defendant of the right to demand trial by jury. *Columbia River Packers Assn. v. Hinton* (D. C.-Ore.), 40 Bull. 19.

Amendments to Conform to the Evidence [Rule 15 (b)].

The appellate court may treat the pleadings as amended to conform to the evidence although the pleadings were not actually amended. *Field v. Waterman S. S. Corp.* (C. C. A. 5), 104 Fed. (2d) 849.

An insufficient complaint may be amended to conform to the evidence even after judgment. *Swift & Co. v. Young* (C. C. A. 4), 107 Fed. (2d) 170.

At the trial of an action for refund of taxes, the government was denied leave to amend its answer so as to raise the questions of the deductibility of the salary of the taxpayer's financial secretary and the rental of a safe-deposit box, since such issues were not tried by express or implied consent of the parties. *duPont v. United States* (D. C.-Del.), 28 Fed. Supp. 122.

Action in a state court against the estate of a deceased trustee by his successor to recover the trust res. At the trial, after both sides had rested, plaintiff was allowed to amend his complaint to conform to the evidence by asking for an accounting. The amendment did not introduce a new cause and, hence, was permissible. In the course of the opinion, meaning of "cause of action" is discussed. *Elliott v. Mosgrove* (S. C.-Ore.), 49 Bull. 18.

Relation Back of Amendments [Rule 15 (c)].

An amended complaint will not be held to relate back to the date of the original complaint if it sets forth new causes of action which would be barred by the statute of limitations if a separate action were instituted thereon. *Whitham Constr. Co. v. Remer* (C. C. A. 10), 105 Fed. (2d) 371; *Ronald Press Co. v. Shea* (D. C.-N. Y.), 27 Fed. Supp. 857; *Hubsch v. United States* (D. C.-N. Y.), 23 Bull. 16.

An amendment based on the same facts as those set forth in the original complaint, the only change being one of theory from an action in contract to one in tort for conversion, relates back to the date of the original pleading, and consequently is not affected by the running of the statute of limitations between the date of the filing of the complaint and the date of the amendment. *White v. Holland Furnace Co., Inc.* (D. C.-Ohio), 31 Fed. Supp. 32.

An amendment may not introduce a new claim for relief barred by the statute of limitations. *White v. Holland Furnace Co., Inc.* (D. C.-Ohio), 31 Fed. Supp. 32.

In an action by an administratrix for wrongful death, it was held that the letters of administration were invalid because granted by a court having no

jurisdiction. Subsequently plaintiff procured valid letters. An amendment to the complaint pleading her second appointment as administratrix relates back to the date of filing of the original complaint and the expiration in the meantime of the period prescribed by the statute of limitations does not bar the action. *Echevarria v. Texas Co.* (D. C.-Del.), 31 Fed. Supp. 596.

Even though the original complaint may be defective, motion for leave to file an amended complaint should be granted, such amendments to relate back to the date of the original complaint, if the claim asserted in the amended pleading arose out of the same conduct, transaction, or occurrence as was attempted to be set forth in the original complaint. *Hubsch v. United States* (D. C.-N. Y.), 23 Bull. 18.

377. Order Granting Leave to Amend Pleading.

(Caption.)

This cause was heard on motion of plaintiff (defendant) for leave to serve an amended complaint (answer) herein, and the court having been fully advised, it is

Ordered, that leave is hereby granted to the plaintiff (defendant) to serve an amended complaint (answer), a copy of which is annexed hereto, within — days after the date of this order.

Date——.

United States district judge.

378. Order Extending Time to Amend.

(Caption.)

On motion of plaintiff and defendant consenting thereto, it is

Ordered, that the time within which the plaintiff may amend his complaint is hereby extended to and including the — day of —, 19—.

Date——.

United States district judge.

379. Amended Pleading.

(Caption.)

Plaintiff (defendant) for his amended complaint (answer) served pursuant to an order of this court dated — —, 19—, alleges:

[Set forth complete amended pleading.]

380. Notice of Motion for Leave to Amend Complaint.

(Caption.)

To _____
Attorney for defendant._____
Address.

Please take notice that the undersigned will move the court at — on the — day of —, 19—, at — —. M., or as soon thereafter as counsel can be heard, for leave to serve and file herein an amended complaint, copy of which is hereto attached.

Date—.

Attorney for plaintiff._____
Address.**381. Order Granting Leave to Amend Complaint.**

(Caption.)

This cause came on to be heard on plaintiff's motion for leave to amend the complaint herein, and it appearing to the court that such amended complaint would clarify the issues herein, it is

Ordered, that the motion for leave to amend be and is hereby granted.

Date—.

United States district judge.**382. Order Dismissing Amended Complaint.**

(Caption.)

This cause came on to be heard on defendant's motion to dismiss the amended complaint, on the ground that said amended complaint fails to state a claim against defendant upon which relief can be granted, and it is

Ordered, that the amended complaint herein be and the same is hereby dismissed.

Date—.

United States district judge.**383. Motion for Leave to Serve Supplemental Pleading.**

(Caption.)

Plaintiff (defendant) moves for leave to serve a supplemental complaint (answer) herein setting forth [transactions or occurrences or events which have happened since the date of service of pleading sought to be supple-

mented]. A copy of such supplemental complaint (answer) is hereto annexed.

Attorney for plaintiff (defendant).

Address.

Cross-Reference.

See note to Form 384.

384. Notice of Motion.

To _____
Attorney for defendant (plaintiff).

Address.

Please take notice that the undersigned will bring the above motion on for hearing before this court at —, on the — day of —, 19—, at — M. of that day or as soon thereafter as counsel can be heard.

Attorney for plaintiff (defendant).

Address.

Federal Rules of Civil Procedure.

"Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be sup-

plemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor." Rule 15 (d).

NOTE OF ADVISORY COMMITTEE TO RULE 15 (d): "This is an adaptation of Equity Rule 34 (Supplemental Pleading)."

NOTES TO DECISIONS

In General.

A supplemental complaint may not constitute a separate, distinct, and new claim for relief but must cover matters subsequently occurring but pertaining to the original cause. *Berssenbrugge v. Luce Mfg. Co.* (D. C.-Mo.), 30 Fed. Supp. 101.

The new rules do not permit any broader latitude in respect to supplemental pleadings than did the equity rules. *Berssenbrugge v. Luce Mfg. Co.* (D. C.-Mo.), 30 Fed. Supp. 101.

In a patent suit, a different act of infringement than that charged in the

original complaint may not form the basis of a supplemental complaint. *Berssenbrugge v. Luce Mfg. Co.* (D. C.-Mo.), 30 Fed. Supp. 101.

Plaintiff, in an action for infringement of a patent in which the complaint is dismissed for want of capacity to sue on the ground that plaintiff is merely a cotenant of the patent, may subsequently acquire the interest of his cotenant, and amend the complaint to show that he is the owner of the patent. *Gibbs v. Emerson Elec. Mfg. Co.* (D. C.-Mo.), 31 Fed. Supp. 983.

385. Order Granting Leave to Serve Supplemental Pleading.

(Caption.)

This cause was heard on motion of plaintiff (defendant) for leave to serve a supplemental complaint (answer) herein, and it appearing to the court that such supplemental complaint (answer) sets forth transactions or occurrences or events which have happened since the date of service of the original complaint (answer), it is

Ordered, that leave is hereby granted to plaintiff (defendant) to serve the supplemental complaint (answer), copy of which is hereto annexed, within — days; and it is further

Ordered, that the defendant may plead to or move in respect to such supplemental complaint within — days after same is served on him.

Date—.

United States district judge.**Cross-Reference.**

In connection with Forms 358 to 389,
see notes to Form 384.

386. Supplemental Pleading.

(Caption.)

Plaintiff (defendant) for his supplemental complaint (answer) herein, served pursuant to an order of this court dated — —, 19—, alleges:

[Set forth the additional facts.]

387. Motion for Leave to Supplement Complaint.

(Caption.)

Plaintiff moves the court for leave to serve and file a supplemental complaint setting forth the following events which have happened since the date of the service of the original complaint:

1. _____
2. _____
3. _____

Date—.

Attorney for plaintiff.**388. Notice of Motion to Supplement Complaint.**

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that plaintiff, —, will move before this court at —, on the — day of —, 19—, at — —. M., or as soon thereafter as counsel

can be heard, for leave to serve and file a supplemental complaint, a copy of which is attached hereto.

Date_____.

Attorney for plaintiff.

389. Order Granting Leave to File Supplemental Complaint.

(Caption.)

This cause came on for hearing on motion of counsel for plaintiff herein, and it is

Ordered, that —, plaintiff herein, be and he hereby is permitted to serve and file the attached supplemental complaint.

Date_____.

United States district judge.

CHAPTER 15

PRETRIAL PROCEDURE

Form

395. Notice of pretrial conference.
396. Pretrial order (tort action).

Form

397. Pretrial order (contract action).
398. Order on pretrial conference.

INTRODUCTION.—Pretrial procedure is one of the outstanding accomplishments of the new Rules. It has resulted in the disposition of a large percentage of cases without a trial. It has also served to narrow the issues and eliminate much needless testimony in a considerable proportion of the remaining actions. The outcome has been a notable speeding up of congested dockets and marked reduction of calendar arrears.

Pretrial procedure consists of an informal conference between court and counsel. Because of its very nature, it involves very few forms. In fact, none are needed except an order recording the results of the conference, and possibly a notice of the time when and place where it is to take place.

395. Notice of Pretrial Conference.

District Court of the United States

District of _____

(Caption.)

NOTICE OF PRETRIAL

The above-entitled case will be called for pretrial, in accordance with the provisions of Rule 16 of the Federal Rules of Civil Procedure, on —, —, 19—, at — —. M.

Trial attorneys for all parties must be present at the time designated with their case fully investigated and completely prepared for pretrial. Dismissal or default will follow failure to appear. The question of the jurisdictional amount may, wherever proper and if not previously determined, be disposed of at the pretrial. The nonjury trial list will be made up at this session.

Clerk.

Note.

Forms 395 to 397 were used in the District Court of the United States for the District of Massachusetts.

Federal Rules of Civil Procedure.

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

"(1) The simplification of the issues;
 "(2) The necessity or desirability of amendments to the pleadings;

"(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

"(4) The limitation of the number of expert witnesses;

"(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

* * * Rule 16.

NOTE OF ADVISORY COMMITTEE TO RULE 16: "1. Similar rules of pretrial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see A Proposal for Minimiz-

ing Calendar Delay in Jury Cases (Dec. 1936—published by The New York Law Society); Pre-Trial Procedure and Administration, Third Annual Report of the Judicial Council of the State of New York (1937), pages 207-243; Report of the Commission on the Administration of Justice in New York State (1934), pp. (288)-(290). See also Pre-trial Procedure in the Wayne Circuit Court, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63-75; and Sunderland, The Theory and Practice of Pre-trial Procedure (Dec. 1937) 36 Mich. L. Rev. 215-226, 21 J. Am. Jud. Soc. 125. Compare the English procedure known as the "summons for directions," English Rules Under the Judicature Act (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N. J. Comp. Stat. (2 Cum. Supp. 1911-1924) tit. 163, § 293, (Supp. 1925-1930) tit. 163, § 347a, N. J. Supreme Court Rules, 2 N. J. Misc. Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N. J. Misc. Rep. (1933) 955).

"2. Compare the similar procedure under Rule 56 (d) (Summary Judgment—Case Not Fully Adjudicated on Motion). Rule 12 (g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53 (b) (Masters; Reference) and 53 (e) (3) (Master's Report: In Jury Actions)."

NOTES TO DECISIONS

In General.

After counsel for one party has incurred expenses in preparing evidence and subpoenaing witnesses to prove certain facts which could have and should have been admitted at the pretrial conference, opposing counsel should not be permitted, over the objection of the former, to admit such facts at the trial thereby eliminating proof on the questions involved. *Byers v. Clark & Wilson Lbr. Co.* (D. C.-Ore.), 27 Fed. Supp. 302.

In view of the provisions for pretrial procedure, the court may, in advance of a second trial of an action, make rulings as to the use of testimony given by a witness at the first trial. *Penn v. Automobile Ins. Co.* (D. C.-Ore.), 27 Fed. Supp. 337.

Plaintiff's failure to appear at a pretrial conference ordered by the court, advance notice of which was given to the attorneys for both parties, constitutes a failure to prosecute and failure to comply with the rules, and defendant's motion to dismiss the action on the merits should be granted. *Wisdom v. Texas Co.* (D. C.-Ala.), 27 Fed. Supp. 992.

A motion for the production of voluminous documents and for taking of lengthy depositions, made four years after institution of suit, during which time an action involving substantially the same issues was commenced in another court in which depositions were taken, should be denied. Pretrial procedure for a simplification of the issues

was suggested. *Cumberland Corp. v. McLellan Stores Co.* (D. C.-N. Y.), 27 Fed. Supp. 994.

At a pretrial conference, the court may take evidence on the question of jurisdiction, and if it is found that jurisdiction is lacking, the action may be dismissed with prejudice. *Fink v. United States* (D. C.-Wash.), 28 Fed. Supp. 556.

Pretrial procedure may be used as a substitute for a bill of particulars, after answers are filed and interrogatories answered, for the simplification of the issues and determination of question of necessary amendments. *Deltex Rug Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122; *Pearson v. Hershey Creamery Co.* (D. C.-Pa.), 30 Fed. Supp. 82.

No proof need be offered as to any facts admitted at a pretrial hearing. *Miles Laboratories, Inc. v. Seignious, Sr.* (D. C.-S. Car.), 30 Fed. Supp. 549.

Although a party agrees at pretrial hearing that the only issues remaining in a case are constitutional questions, he is not thereafter precluded from challenging the jurisdiction of the court, since the question of jurisdiction may be raised at any stage of a case. *Miles Laboratories, Inc. v. Seignious, Sr.* (D. C.-S. Car.), 30 Fed. Supp. 549.

A pretrial conference resulted in a stipulation disposing of all of the issues raised by the pleadings, leaving for subsequent determination only the question as to whether interest runs on the obligation involved and, if so, from what date. *Haywood v. Maschke* (D. C.-Pa.), 31 Fed. Supp. 664.

396. Pretrial Order (Tort Action).

District Court of the United States

District of _____

MK, Administrator,

MS

v.

AD.

No. — Law

No. — Law

PRETRIAL ORDER (UNDER RULE 16)

At a pretrial hearing of the above-entitled action, the parties being present in court, or represented by counsel, made the following stipulations and admissions:—

These are two automobile tort cases involving one death and injuries to the other plaintiff.

Both cars were properly registered. Both drivers were duly licensed. The accident occurred upon a public highway.

The defendant was the owner and operator of his car.

S was operating the car in which the plaintiffs MS and MK were passengers.

The accident happened on — —, 19—. The S car was proceeding easterly from — to —. The AD car had been driven into a driveway which is just west of the house in which Miss A, his companion, lived. It is in dispute whether AD's car was at rest or in motion at the moment of the accident.

E Hospital records may be admitted without formal proof.

It is ordered, that the subsequent course of the action be controlled by the foregoing, unless modified at the trial thereof to prevent manifest injustice.

Entered — — —, 19—.

United States district judge.

MEMORANDUM

Remarks:

Jurisdiction.

Trial attorneys: For plaintiff —————

Phone: —————

For defendant —————

Phone: —————

Estimated length of trial: — days.

Prospect of settlement: None Slight Fair Good Excellent.

Cross-Reference.

In connection with Forms 396 to 398,
see notes to Form 395.

397. Pretrial Order (Contract Action).

District Court of the United States

District of —————

WM

v.

— Power & Light Co.

}

No. — Law

PRETRIAL ORDER (UNDER RULE 16)

At a pretrial hearing of the above-entitled action, the parties being present in court, or represented by counsel, made the following stipulations and admissions:—

This is an action on a contract to indemnify.

The defendant admits the execution of the contract in favor of the plaintiff.

The partnership to whom the bond was executed has been dissolved and a valid assignment of that contract has been made to the plaintiff.

The plaintiff admits that since 19— WM has been continuously legally domiciled in the state of Missouri up to the present time. The partnership of AM and WM had its principal office in —, Missouri, from at least as early as 19— and as long as they had an office.

The defendant agrees that the SS "—" left the port of New York for —, South Carolina, — —, 19—, and has not been in the port of New York since.

It is ordered, that the subsequent course of the action be controlled by the foregoing, unless modified at the trial thereof to prevent manifest injustice.

Entered — — —, 19—.

United States district judge.

MEMORANDUM

Remarks:

Jurisdiction.

Trial attorneys: For plaintiff _____

Phone: _____

For defendant _____

Phone: _____

Estimated length of trial: — days.

Prospect of settlement: None Slight Fair Good Excellent.

398. Order on Pretrial Conference.

District Court of the United States
District of Columbia

John Doe,
Plaintiff,

v.

United States of America,
Defendant.

} Civil Action No. —
Order on Pretrial Conference

The attorneys for the parties to this action having appeared before the court for a pretrial conference, the following action was taken at such conference:

The parties agreed to stipulate for the purposes of this action only:

1. That the following documents were executed and delivered by the parties whose signatures they bear, on the days of their dates:
 - a. _____
 - b. _____
 - c. _____
2. That the following conditions precedent were performed:
 - a. _____
 - b. _____
 - c. _____
3. That the defendant made the following payments to plaintiff on account of the claim herein:
 - a. _____
 - b. _____
 - c. _____

4. That the number of expert witnesses be limited to not more than two for each party.
5. That the trial of this action be limited to the following issues:
 - a. _____
 - b. _____
 - c. _____

The plaintiff (defendant) having requested leave to amend his complaint (answer), it is hereby

Ordered, that the plaintiff (defendant) have leave to amend the complaint (answer) as follows: [Herein state amendments desired]; [and that the answer heretofore served stand as the answer to the amended complaint].

Date_____.

Associate Justice.

CHAPTER 16

DEPOSITIONS AND DISCOVERY

Section

1. Depositions, Forms 405 to 452.
2. Interrogatories, Forms 455 to 463.
3. Production of Documents, Forms 466 to 468.
4. Physical Examinations, Forms 471 to 474.

Section

5. Requests for Admissions, Forms 477 to 483.
6. Enforcement of Discovery, Forms 486-500.

INTRODUCTION.—One of the noteworthy features of the Federal Rules of Civil Procedure is found in their treatment of the subject of discovery. There is provided a complete array of different methods of discovery, all, however, fashioned to achieve the same end. Their field of usefulness is limited practically only by the ingenuity and resourcefulness of counsel. It will be recalled that these methods are five in number: First, Depositions, or “examinations before trial,” to use the terminology of the Codes; second, interrogatories; third, production and inspection of documents and other objects; fourth, requests for admissions; and fifth, physical and mental examinations. The purpose of discovery is to afford a means, not only for securing evidence which the moving party needs in support of his case or defense, but also for procuring information which may be of help in preparing for trial. Consequently, the moving party may take depositions not only for the purpose of obtaining evidence on issues on which he has the burden of proof, but also for the purpose of inquiring into matters relating to his adversary’s case.

Similarly, the mere fact that the matters regarding which discovery is sought happen to be within the knowledge of the moving party, is no objection to taking a deposition of the adverse party or filing interrogatories in respect thereto. The reason for this conclusion is obvious. Frequently, it is not sufficient for a party to have knowledge of the facts. It is necessary for him to transform them into such shape as would render them admissible in evidence. Moreover, it is manifestly useful and desirable, with a view to diminishing the expense of trials and the time consumed by them, to ascertain in advance to what extent the facts will be admitted by the adverse party.

Requests for admissions have a cognate purpose. If the party on whom such a document is served either is familiar with the facts or else has the facilities for readily ascertaining their accuracy, there is no reason why he should not admit the truth under penalty of being required to recompense the adverse party for the expense incurred in proving the facts at the trial. The philosophy underlying this procedure is that a lawsuit

should not be conducted as a game of chess, in which the most skilful player secures the victory. On the contrary, it is assumed that litigation is to be regarded as an efficacious mode of determining the truth and adjudicating rights. Whatever pertinent information is in the possession of either party must be made available to his antagonist prior to the trial.

SECTION 1

DEPOSITIONS

- | Form | Form |
|--|--|
| 405. Motion for leave to take deposition before issue joined. | 428. Order granting motion for letters rogatory. |
| 406. Order granting leave to take deposition before issue joined. | 429. Letters rogatory. |
| 407. Notice of taking depositions of individuals. | 430. Stipulation to take depositions. |
| 408. Notice of taking deposition of individuals (alternative form). | 431. Motion for order that deposition be not taken and to limit examination. |
| 409. Notice of taking of depositions. | 432. Motion to terminate or limit examination. |
| 410. Notice of taking deposition of corporation. | 433. Order terminating or limiting examination. |
| 411. Notice of taking deposition of corporation (alternative form). | 434. Order fixing place of and limiting examination. |
| 412. Motion to vacate notice for taking of depositions, for failure to obtain leave of court. | 435. Deposition. |
| 413. Motion to vacate notice for taking of depositions because of fatal defect. | 436. Certificate on deposition of officer before whom taken. |
| 414. Motion to vacate notice for taking of depositions, because deposition has already been taken. | 437. Notice of motion to suppress deposition. |
| 415. Order granting motion to vacate notice. | 438. Order suppressing deposition. |
| 416. Order denying motion to vacate notice. | 439. Notice of filing of depositions. |
| 417. Petition to perpetuate petitioner's testimony under Rule 27(a). | 440. Motion for expenses for failure to attend taking of deposition. |
| 418. Petition to perpetuate testimony of third person under Rule 27(a). | 441. Order for payment of expenses for failure to attend taking of depositions. |
| 419. Notice of application to perpetuate testimony. | 442. Motion for expenses for failure to serve subpoena upon witness. |
| 420. Order directing perpetuation of testimony. | 443. Order directing payment of expenses for failure to subpoena witness. |
| 421. Order directing perpetuation of testimony of petitioner. | 444. Notice of taking deposition of witness upon interrogatories. |
| 422. Motion to perpetuate testimony pending appeal. | 445. Direct interrogatories to witness. |
| 423. Order to perpetuate testimony pending appeal. | 446. Notice of motion for enlargement of time to serve cross interrogatories. |
| 424. Motion for commission to take testimony in foreign country. | 447. Order enlarging time to serve interrogatories. |
| 425. Order granting motion for commission. | 448. Notice of cross, redirect, or recross interrogatories to be addressed to a witness. |
| 426. Commission to take depositions. | 449. Notice of cross, redirect, and recross interrogatories. |
| 427. Motion for letters rogatory. | 450. Cross, redirect, and recross interrogatories to witness. |

Form

451. Motion for protection of deponents
testifying on written interroga-
tories.

Form

452. Order for protection of deponents
testifying on written interroga-
tories.

405. Motion for Leave to Take Deposition Before Issue Joined.

(Caption.)

The plaintiff moves the court for leave to take the deposition of AB, whose address is —.

The grounds of this motion are as follows: Jurisdiction of defendant has been obtained by service of the summons and complaint on him on — —, 19—, but no answer has been served.

The deposition of AB is desired for use on a motion filed by defendant to dismiss the action for want of jurisdiction.

OR

AB is planning to leave shortly on an extended trip to Europe, and his testimony should be secured at this time.

OR

AB is aged and infirm, and his testimony should be secured as promptly as possible.

(Or use other appropriate reason.)

Attorney for plaintiff.

Address.

Federal Rules of Civil Procedure.

"By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes." Rule 26 (a).

"Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in

the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts." Rule 26 (b).

"Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b). Rule 26 (c).

"Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held." Rule 28 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 26 (a): "This rule freely authorizes the taking of depositions under the same circumstances and by the same methods

whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark. Civ. Code (Crawford, 1934) §§ 606-607; Calif. Code Civ. Proc. (Deering, 1937) § 2021; 1 Colo. Stat. Ann. (1935) Code Civ. Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill. Rules of Pract., Rule 19 (Ill. Rev. Stat. (1937) ch. 110, § 259.19); Ill. Rev. Stat. (1937) ch. 51, § 24; 2 Ind. Stat. Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky. Codes (Carroll, 1932) Civ. Pract. § 557; 1 Mo. Rev. Stat. (1929) § 1753; 4 Mont. Rev. Codes Ann. (1935) § 10645; Neb. Comp. Stat. (1929) ch. 20, §§ 1246-7; 4 Nev. Comp. Laws (Hillyer, 1929) § 9001; 2 N. H. Pub. Laws (1926) ch. 337, § 1; N. C. Code Ann. (1935) § 1809; 2 N. D. Comp. Laws Ann. (1913) §§ 7889-7897; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11525-6; 1 Ore. Code Ann. (1930) tit. 9, § 1503; 1 S. D. Comp. Laws (1929) §§ 2713-16; Tex. Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev. Stat. Ann. (1933) § 104-51-7; Wash. Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 308-8; W. Va. Code (1931) ch. 57, art. 4, § 1. Compare Equity Rules 47 (Depositions—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

"This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U. S. C., Title 28, §§ 639 (Depositions de bene esse; when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and in *perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U. S. C., Title 28, § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

"While a number of states permit discovery only from parties or their agents,

others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark. Civ. Code (Crawford, 1934) §§ 606-607; 1 Idaho Code Ann. (1932) § 16-906; Ill. Rules of Pract., Rule 19 (Ill. Rev. Stat. (1937) ch. 110, § 259.19); Ill. Rev. Stat. (1937) ch. 51, § 24; 2 Ind. Stat. Ann. (Burns, 1933) § 2-1501; Ky. Codes (Carroll, 1932) Civ. Pract. §§ 554-558; 2 Md. Ann. Code (Bagby, 1924) Art. 35, § 21; 2 Minn. Stat. (Mason, 1927) § 9820; 1 Mo. Rev. Stat. (1929) §§ 1753, 1759; Neb. Comp. Stat. (1929) ch. 20, §§ 1246-7; 2 N. H. Pub. Laws (1926) ch. 337, § 1; 2 N. D. Comp. Laws Ann. (1913) § 7897; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11525-6; 1 S. D. Comp. Laws (1929) §§ 2713-16; Tex. Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev. Stat. Ann. (1933) § 104-51-7; Wash. Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 308-8; W. Va. Code (1931) ch. 57, art. 4, § 1.

"The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif. Code Civ. Proc. (Deering, 1937) § 2031; 2 Fla. Comp. Gen. Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill. Rules of Pract., Rule 19 (Ill. Rev. Stat. (1937) ch. 110, § 259.19); Ill. Rev. Stat. (1937) ch. 51, § 24; 2 Ind. Stat. Ann. (Burns, 1933) § 2-1502; Kan. Gen. Stat. Ann. (1935) § 60-2827; Ky. Codes (Carroll, 1932) Civ. Pract. § 565; 2 Minn. Stat. (Mason, 1927) § 9820; 1 Mo. Rev. Stat. (1929) § 1761; 4 Mont. Rev. Codes Ann. (1935) § 10651; Nev. Comp. Laws (Hillyer, 1929) § 9002; N. C. Code Ann. (1935) § 1809; 2 N. D. Comp. Laws Ann. (1913) § 7895; Utah Rev. Stat. Ann. (1933) § 104-51-8."

NOTE OF ADVISORY COMMITTEE TO RULE 26 (b): "While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala. Code Ann. (Michie, 1928) §§ 7764-7773; 2 Ind. Stat. Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728—2-1732; Iowa Code (1935) § 11185; Ky. Codes (Carroll, 1932) Civ. Pract. §§ 557, 606 (8); La. Code Pract.

(Dart, 1932) arts. 347-356; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, §§ 61-67; 1 Mo. Rev. Stat. (1929) §§ 1753, 1759; Neb. Comp. Stat. (1929) §§ 20-1246, 20-1247; 2 N. H. Pub. Laws (1926) ch. 337, § 1; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11497, 11526; Tex. Stat. (Vernon, 1928) arts. 3738, 3753, 3769; Wis. Stat. (1935) § 326.12; Ontario Consol. Rules of

Pract. (1928) Rules 237-347; Quebec Code of Civ. Proc. (Curran, 1922) §§ 286-290."

NOTE OF ADVISORY COMMITTEE TO RULE 28: "In effect this rule is substantially the same as U. S. C., Title 28, § 639 (Depositions de bene esse; when and where taken; notice). U. S. C., Title 28, § 642 (Depositions, acknowledgments, and affidavits taken by notaries public) does not conflict with Subdivision (a)."

NOTES TO DECISIONS

Scope of Examination [Rule 26 (b)].

In an action to obtain the issue of letters patent, the plaintiff may, by use of depositions, examine the person previously held to have been the prior inventor, to ascertain whether he has granted an exclusive license, since an exclusive licensee is an indispensable party to such an action. After ascertaining the facts in this manner, the licensee may be brought in as an additional party defendant, if the court has jurisdiction over him. *Nachod & United States Signal Co., Inc. v. Automatic Signal Corp.* (C. C. A. 2), 105 Fed. (2d) 981.

One of the purposes of the promulgation of these rules being to attain simplicity and flexibility of procedure, they should be interpreted broadly and liberally. In view of this principle of construction, a motion to restrict a deposition will be denied. *Laverett v. Continental Briar Pipe Co.* (D. C.-N. Y.), 25 Fed. Supp. 80, 790; *Stankewicz v. Pillsbury Flour Mills Co.* (D. C.-N. Y.), 26 Fed. Supp. 1003; *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 27 Fed. Supp. 946.

In a suit for patent infringement in which a specifically designated composition is charged with infringing, plaintiff was not required to answer interrogatories asking for an analysis of the composition on the ground that the defendant himself either knew or was in a position to obtain such analysis. *B. B. Chem. Co. v. Cataract Chem. Co.* (D. C.-N. Y.), 25 Fed. Supp. 472.

In a suit for patent infringement, plaintiff was required to answer interrogatories requesting him to state the latest date of sale of the infringing composition of which plaintiff had knowledge. *B. B. Chem. Co. v. Cataract Chem. Co.* (D. C.-N. Y.), 25 Fed. Supp. 472.

In a patent case, the plaintiff when relying on *res judicata* may take the deposition of the defendant's president on the issues of privity between the defendant and the defendant in a former action involving the same patent and the scope of the prior judgment. *Berke v. United Paperboard Co.* (D. C.-N. Y.), 26 Fed. Supp. 412, 40 U. S. P. Q. 538.

A party may be compelled to produce only such papers as are in his possession or under his control. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416.

On an examination before trial, defendant should be required to give any testimony which would be admissible upon the trial of the action, notwithstanding the fact that the information sought is within the knowledge of the plaintiff. *Benevento v. Atlantic & Pacific Food Stores* (D. C.-N. Y.), 26 Fed. Supp. 424.

In a patent suit, defendant may be examined before trial as to the method employed by it in the work in which infringement is alleged to have occurred, drawings relating to methods employed in such work and identity and location of persons having knowledge of the drawing. *Unlandherm v. Park Contracting Corp.* (D. C.-N. Y.), 26 Fed. Supp. 743, 40 U. S. P. Q. 540.

In a patent suit, examination before trial should not be permitted as to matters relating to the question of damages. *Unlandherm v. Park Contracting Corp.* (D. C.-N. Y.), 26 Fed. Supp. 743, 40 U. S. P. Q. 540.

A witness whose deposition is to be taken orally may not be required to divulge information which is privileged by reason of an attorney-client relationship. *Grauer v. Schenley Products Co.* (D. C.-N. Y.), 26 Fed. Supp. 768.

During the taking of depositions in a patent suit, the inventor of the defendant's process should be required to respond to questions relating to his interest in such patent after its assignment to defendant. *Floridin Co. v. Attapulgis Clay Co.* (D. C.-Del.), 26 Fed. Supp. 968.

When both parties serve notices to take depositions, the one who first serves his notice should ordinarily be permitted to complete his examinations before the other begins. *Bough v. Lee* (D. C.-N. Y.), 26 Fed. Supp. 1000.

In an action for personal injuries plaintiff is entitled to an inquiry into and production of a statement previously given by plaintiff to defendant's insurer, and certain photographs relating to the accident, previously exhibited to plaintiff by the insurer. *Bough v. Lee* (D. C.-N. Y.), 26 Fed. Supp. 1000.

In a personal injury action, plaintiff's motion that defendant's examination of the plaintiff before trial be restricted to the manner of the happening of the accident, and exclude inquiry as to the names and addresses of any of the witnesses thereto, should be denied in the absence of any showing that the examination is being conducted in bad faith or in such a manner as to annoy, harass, or oppress the plaintiff. *Stankewicz v. Pillsbury Flour Mills Co.* (D. C.-N. Y.), 26 Fed. Supp. 1003.

A witness whose deposition is being taken orally may be required, in the discretion of the court, to submit to inspection by examining counsel any papers produced in response to a subpoena duces tecum. See Rule 45 (d). *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.* (D. C.-N. Y.), 27 Fed. Supp. 121.

As a matter of discretion, the court will not permit inspection by examining counsel of papers produced in response to a subpoena duces tecum by a witness whose deposition is being taken and who is not a party to the action if the papers are not admissible in evidence and their disclosure might seriously embarrass or prejudice the witness. See also Rule 30 (b). *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.* (D. C.-N. Y.), 27 Fed. Supp. 121.

During the taking of a deposition under this rule in an action to recover for the wrongful taking of property, a witness who had denied that defendants

had taken any such property, should, nevertheless, be required to furnish the names of persons to whom other similar property was sold by defendants. *Thompson v. Oil Refineries* (D. C.-La.), 27 Fed. Supp. 123.

In an action on fire insurance policies, in which the answer alleges arson as a defense, plaintiff's motion for an order directing defendant to supply the names of all persons having knowledge to support the defense, for the purpose of enabling plaintiff to examine the witnesses before trial, should be denied if it appears that to permit such procedure would interfere with impending criminal prosecution of plaintiff on the charge of arson. *Penn v. Automobile Ins. Co.* (D. C.-Ore.), 27 Fed. Supp. 337.

The claim of privilege may be raised during the taking of the depositions but should not be considered on a motion to vacate the notice to take depositions or to vacate subpoena. *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 27 Fed. Supp. 946.

In an automobile accident case, plaintiff is entitled to take depositions of officers of defendant's liability insurance carrier concerning written statements obtained by the company from plaintiff and his passengers at the time of the accident and reports of physicians. Such statements are not privileged and may not be made so by turning them over to defendant's attorney. *Kulich v. Murray* (D. C.-N. Y.), 28 Fed. Supp. 675; *Price v. Levitt* (D. C.-N. Y.), 29 Fed. Supp. 164.

The scope of discovery by interrogatories is as broad as that by deposition and anything that may be asked on oral examination may also be inquired into by interrogatories. *Landry v. O'Hara Vessels, Inc.* (D. C.-Mass.), 29 Fed. Supp. 423.

The scope of an examination before trial should not be limited on a motion to modify the notice before the examination. If it thereafter appears that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the examination may be suspended for the presentation of a motion to terminate or limit the examination. *Krier v. Muschel* (D. C.-N. Y.), 29 Fed. Supp. 482.

In an action for personal injuries, defendant's attorney at the taking of his

deposition must produce for inspection by plaintiff's attorney a statement previously given by the plaintiff to the defendant's insurer, if such statement is in the possession of defendant's attorney. *Bough v. Lee* (D. C.-N. Y.), 29 Fed. Supp. 498.

The delivery to defendant's attorney of a statement made by the plaintiff to defendant's insurer does not make such statement a privileged communication. *Bough v. Lee* (D. C.-N. Y.), 29 Fed. Supp. 498.

In an action to recover on an insurance policy, plaintiff should not be permitted to take the deposition of an investigator employed by the defendant concerning statements made to him by other persons during the investigation, since such matters are hearsay and are not relevant to the subject-matter. *Rose Silk Mills, Inc. v. Insurance Co. of North America* (D. C.-N. Y.), 29 Fed. Supp. 504.

If the notice to take deposition discloses the exact nature of the information sought and it appears that such information is irrelevant, the court may order that the deposition shall not be taken, instead of deferring the matter to the taking of the deposition. *Rose Silk Mills, Inc. v. Insurance Co. of North America* (D. C.-N. Y.), 29 Fed. Supp. 504.

A party should not be permitted to examine affidavits and similar materials secured by another party by independent investigation incident to the preparation of the latter's case for trial, except in the most unusual circumstances. *McCarthy v. Palmer* (D. C.-N. Y.), 29 Fed. Supp. 585.

In an action for personal injuries sustained in an automobile accident, plaintiff was denied right to take depositions of the executive officers of defendant corporation on the ground that they would not be competent witnesses since they were not present at the accident and knew nothing about it. *Fletcher v. Foremost Dairies, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 744.

A party may not be examined as to whether he has violated a restraining order issued in the action, in the absence of any proceedings to punish for contempt. *Radio Corp. of America v. Solat* (D. C.-N. Y.), 31 Fed. Supp. 516.

A party is not entitled to examination before trial on matters within his own

knowledge nor on matters admitted in adversary's pleadings. *Norton v. Cooper-Jarrett, Inc.* (D. C.-N. Y.), 11 Bull. 6, 1 Fed. R. Dec. 92.

The scope of examinations before trial does not extend to information, collateral to the issues, sought for the sole purpose of cross-examining and impeaching a witness who may testify for the adverse party. *Lynch v. Henry Pollak, Inc.* (D. C.-N. Y.), 33 Bull. 31, 1 Fed. R. Dec. 120.

On examination before trial a party should not be required to disclose the "names of anybody who knows anything about your accident." *Barter v. Eastern S. S. Lines, Inc.* (D. C.-N. Y.), 37 Bull. 11, 1 Fed. R. Dec. 65.

If a client has previously waived privilege, the attorney may not invoke it when the attorney's deposition is being taken. *Knaust Bros. v. Goldschlag* (D. C.-N. Y.), 41 Bull. 17.

When Depositions May be Taken [Rule 26 (a)].

Depositions of witnesses before trial ordinarily may be taken for discovery, and such procedure should be liberally construed in the discretion of the court. *National Bondholders Corp. v. McClintic* (C. C. A. 4), 99 Fed. (2d) 595.

Equity Rule 58 as to interrogatories has been abrogated by Rules of Civil Procedure 26 to 37, and Rules of Civil Procedure were applicable to patent infringement suit filed December, 1935, in which there was stipulation allowing discovery and interrogatories to be filed as to matters prior to date of filing. *Nichols v. Sanborn Co.* (D. C.-Mass.), 24 Fed. Supp. 908, 39 U. S. P. Q. 153.

Under rules of civil procedure discovery may be had to ascertain facts relating not only to party's own case but his adversary's also, and scope of examination allowed under Rule 33 is coextensive with scope of examination permitted under this rule. *Nichols v. Sanborn Co.* (D. C.-Mass.), 24 Fed. Supp. 908, 39 U. S. P. Q. 153.

Rules of Civil Procedure 26 to 37 were formulated with intention of granting widest latitude in ascertaining before trial facts concerning real issues in dispute and permitting interrogatories to parties on any relevant matter. *Nichols v. Sanborn Co.* (D. C.-Mass.), 24 Fed. Supp. 908, 39 U. S. P. Q. 153; *Dixon v.*

Sunshine Bus Lines (D. C.-La.), 27 Fed. Supp. 797.

A resident of a district in which the deposition is to be taken who resides and transacts his business in person in one county can not be required to attend an examination in any other county. *Laverett v. Continental Briar Pipe Co.* (D. C.-N. Y.), 25 Fed. Supp. 80, 790.

Notice to take depositions given by plaintiff after answer has been filed should not be set aside on the assertion that defendant intends to file an amended answer. *Saviolis v. National Bank* (D. C.-N. Y.), 25 Fed. Supp. 966.

This rule should not be construed as requiring plaintiff to answer an interrogatory as to what respect the defendant, its agents, or servants, were negligent in causing the injuries alleged in the declaration. *Bailey v. General Sea Foods* (D. C.-Mass.), 26 Fed. Supp. 391.

The fact that a bill of particulars has been served does not bar an examination before trial. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416.

A notice to take the depositions of "such other officer or officers as may have knowledge of the matters herein-after referred to" is too general to require a party to produce anyone for examination. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416.

This rule applied to action pending before effective date of the rules. *Columbia Metaloy Co. v. Bank of America* (D. C.-Cal.), 26 Fed. Supp. 765.

Rule 26 (a), permitting taking of depositions without leave of court after answer is filed, applied to action pending before effective date. *Columbia Metaloy Co. v. Bank of America* (D. C.-Cal.), 26 Fed. Supp. 765; *Clair v. Philadelphia Storage Battery Co.* (D. C.-Pa.), 27 Fed. Supp. 777; *United States v. Aluminum Co.* (D. C.-N. Y.), 27 Fed. Supp. 826.

A notice to take depositions under this rule need not state upon what matters the examination is sought. *Bennett v. Westover* (D. C.-N. Y.), 27 Fed. Supp. 10.

When plaintiff moves for leave to examine defendant before issue joined, such examination should not be deferred until completion of the examination of plaintiff previously ordered on defendant's motion, in view of the requirement that the rules be construed to secure a just, speedy, and inexpensive determination of

every action. *Thomas v. Goldstone* (D. C.-N. Y.), 27 Fed. Supp. 297.

Motion for more definite statement or for a bill of particulars should be denied and defendant should proceed by discovery if the complaint is not vague or ambiguous and the information is not needed to enable defendant to plead. *Brinley v. Lewis* (D. C.-Pa.), 27 Fed. Supp. 313; *Massachusetts Bonding & Ins. Co. v. Harrisburg Trust Co.* (D. C.-Pa.), 27 Fed. Supp. 987.

A motion which is so involved and indefinitely phrased as to be confusing constitutes failure to proceed in accordance with the rules and should be denied without prejudice. *Barrezueta v. Sword S. S. Line* (D. C.-N. Y.), 27 Fed. Supp. 935.

A party proceeding to take depositions may not move to limit the scope of the examination. *Barrezueta v. Sword S. S. Line* (D. C.-N. Y.), 27 Fed. Supp. 935.

A motion for an order to take depositions need be made only when the examination is sought before joinder of issue. After issue is joined, depositions may be taken without leave of court. *Barrezueta v. Sword S. S. Line* (D. C.-N. Y.), 27 Fed. Supp. 935; *Sweeney v. United Feature Syndicate* (D. C.-N. Y.), 29 Fed. Supp. 420; *Lyons v. Bronx Towing Line* (D. C.-N. Y.), 18 Bull. 26, 1 Fed. R. Dec. 52.

The taking of depositions may be permitted in connection with a motion to dismiss for lack of jurisdiction, in respect to facts germane to the question raised by the motion. *Jiffy Lubricator Co. v. Alemite Co.* (D. C.-N. D.), 28 Fed. Supp. 385.

Information obtained by defendant's insurer in an automobile collision case is not privileged. *Kulich v. Murray* (D. C.-N. Y.), 28 Fed. Supp. 675.

In an action for personal injuries and property damage resulting from an automobile accident, plaintiff may take the depositions of representatives of defendant's insurance company concerning investigations made and statements obtained by them. *Kulich v. Murray* (D. C.-N. Y.), 28 Fed. Supp. 675.

A judgment creditor may not require persons other than the judgment debtor to disclose their assets. *Burak v. Scott* (D. C.-D. C.), 29 Fed. Supp. 775.

In only an exceptional case can more than 15 or 20 interrogatories be conveniently and efficiently submitted. If

a more comprehensive examination of the adverse party is desired, it should ordinarily be done by taking his deposition. *Coca Cola Co. v. Dixi-Colo Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275.

A municipality which is a party to an action may be examined before trial in the same manner as any other corporation, namely, by taking the depositions of its officers. *Joy Mfg. Co. v. New York* (D. C.-N. Y.), 30 Fed. Supp. 403.

Each party should bear its own expenses incurred in the taking of depositions of witnesses, when the direct examination is to be on written interrogatories but one party obtains leave to cross-examine orally and the other party indicates intention to have oral redirect examination. *Winograd Bros. v. Chase Bank* (D. C.-N. Y.), 31 Fed. Supp. 91.

In view of this rule an oral application for leave to take the deposition of a witness, outside the district, after the cause is at issue and answer served, will be denied. *Schultz v. State Mut. Life Assur. Co.* (D. C.-Ore.), 2 Bull. 13.

The Federal Rules of Civil Procedure do not change the rule as to admissibility of testimony of deceased or inaccessible witnesses, save what is there prescribed for taking depositions. *United States v. Aluminum Co.* (D. C.-N. Y.), 7 Bull. 31, 1 Fed. R. Dec. 48.

If the deposition of a party to the action is to be taken orally, it is not necessary to serve a subpoena or to pay fees and mileage. See Rule 45 (c). *Whitaker v. MacFadden Publications* (D. C.-Mass.), 15 Bull. 14.

A party who has moved for a bill of particulars and who is subsequently served by his adversary with notice to take depositions may be entitled to a bill of particulars as to some of the items before the taking of the depositions and the service of a further bill as to the others may be postponed till after such time. *Varey v. Gaunt* (D. C.-N. Y.), 32 Bull. 24, 1 Fed. R. Dec. 204.

Defendant should be denied leave to take depositions of broad scope before answer for the purpose of securing information to enable him to frame his answer. Such information should be obtained by a more definite statement or a bill of particulars. *Pirnie v. Andrews* (D. C.-N. Y.), 55 Bull. 24, 1 Fed. R. Dec. 252.

After answer, the scope of an examination before trial is not restricted to matters which are material to the issues or to testimony which is admissible in evidence, but extends to all matters not privileged, relevant to the subject-matter involved in the action. *Pirnie v. Andrews* (D. C.-N. Y.), 55 Bull. 24, 1 Fed. R. Dec. 252.

406. Order Granting Leave to Take Deposition Before Issue Joined.

This cause came on to be heard on motion of plaintiff for leave to take the deposition of AB, and the court being duly advised in the premises, it is hereby

Ordered, that the plaintiff be and he is hereby granted leave to take the deposition of AB, whose address is —, on — —, 19—, at —, before —, a notary public.

United States district judge.

Cross-Reference.

See notes to Form 405.

407. Notice of Taking Depositions of Individuals.

(Caption.)

Please take notice that on — —, 19—, at — — M., at [state place], before — —, a notary public, the attorney for the plaintiff

(defendant) will take the depositions of AB, whose address is ———, and of CD, whose address is ———.

Attorney for plaintiff (defendant).

Address.

To _____
Attorney for defendant (plaintiff).

Address.

Federal Rules of Civil Procedure.

"A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown

enlarge or shorten the time." Rule 30 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 30 (a): "This is in accordance with common practice. See U. S. C., Title 28, § 639 (Depositions de bene esse; when and where taken; notice), the relevant provisions of which are incorporated in this rule; Calif. Code Civ. Proc. (Deering, 1937) § 2031; and statutes cited in respect to notice in the Note to Rule 26 (a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule."

NOTES TO DECISIONS

In General.

The notice need not state the topics of the proposed depositions. *Saviolis v. National Bank* (D. C.-N. Y.), 25 Fed. Supp. 966. While the Rules do not expressly require that the name of the officer before whom the deposition is to be taken should be stated in the notice, it would seem useful and desirable to do so. *Freeman v. Hotel Waldorf-Astoria* (D. C.-N. Y.), 27 Fed. Supp. 303.

Notice of Examination—Time and Place [Rule 30 (a)].

Notice to take depositions given by plaintiff after answer has been filed should not be set aside on the assertion that defendant intends to file an amended answer. See Rule 26 (a). *Saviolis v. National Bank* (D. C.-N. Y.), 25 Fed. Supp. 966.

Notice to take deposition need not state the matters upon which the examination is sought. *Saviolis v. National Bank* (D. C.-N. Y.), 25 Fed. Supp. 966; *Bennett v. Westover* (D. C.-N. Y.), 27 Fed. Supp. 10; *Goldberg v. Raleigh Mfrs., Inc.* (D. C.-Mass.), 28 Fed. Supp. 975; *Madison v. Cobb* (D. C.-Pa.), 29 Fed. Supp. 881.

Under this rule a defendant may have examination only of plaintiffs specifically named. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416; *Freeman v. Hotel Waldorf-Astoria Corp.* (D. C.-N. Y.), 27 Fed. Supp. 303.

Where plaintiff seeks an examination of defendant under this rule, knowledge of such facts by plaintiff would not bar the examination. The test is whether the testimony would be admissible upon the trial. *Benevento v. Atlantic & Pacific Food Stores* (D. C.-N. Y.), 26 Fed. Supp. 424.

A witness whose deposition is to be taken orally may not be required to divulge information which is privileged by reason of an attorney-client relationship. *Grauer v. Schenley Products Co.* (D. C.-N. Y.), 26 Fed. Supp. 768.

If both parties serve notices to take depositions, the examinations should take place in the order in which the notices were served. *Grauer v. Schenley Products Co.* (D. C.-N. Y.), 26 Fed. Supp. 768; *Bough v. Lee* (D. C.-N. Y.), 26 Fed. Supp. 1000.

The remedy provided in Rule 37 (d) for wilful failure to appear after being served with notice to take depositions

applies only to parties or officers or managing agents of parties and not to other persons. *Freeman v. Hotel Waldorf-Astoria Corp.* (D. C.-N. Y.), 27 Fed. Supp. 303.

The remedy in case a party fails to appear pursuant to notice is prescribed in Rule 37 (d). *Cohn v. Annunziata* (D. C.-N. Y.), 27 Fed. Supp. 805.

Deposition held inadmissible against defendants on whom notice of the taking of the deposition had been served, but not a notice that they had any concern in the taking of the deposition or that it was to be taken or was intended to be offered or used as against them or either of them. *United States v. Aluminum Co.* (D. C.-N. Y.), 27 Fed. Supp. 820.

A party may simultaneously examine his adversary before trial and require him to respond to a request for admission concerning the same matters. *Nakrasoff v. United States Rubber Co.* (D. C.-N. Y.), 27 Fed. Supp. 953.

A notice to take depositions must name the person to be examined or designate him by description sufficient to identify him. Designation of a person as the "superintendent or caretaker in charge of the premises" is compliance with the rule. *Burris v. American Chicle Co.* (D. C.-N. Y.), 29 Fed. Supp. 773; *Cohen v. Pennsylvania R. Co.* (D. C.-N. Y.), 30 Fed. Supp. 419.

Matters clearly within the knowledge of the moving party may not be inquired into by him on an examination before trial. *Burris v. American Chicle Co.* (D. C.-N. Y.), 29 Fed. Supp. 773.

A person may not arbitrarily refuse to attend the taking of his deposition after having been properly served with notice therefore, irrespective of the grounds for such action. *Madison v. Cobb* (D. C.-Pa.), 29 Fed. Supp. 881.

Upon a proper showing, a deponent may obtain a limitation of the scope of his examination before the time specified in the notice for taking the deposition, or during the examination he may move the court to stop it or limit the scope and manner thereof. *Madison v. Cobb* (D. C.-Pa.), 29 Fed. Supp. 881.

A notice to take the deposition of a corporate party is defective if the officer named in it no longer occupies his office. *Cohen v. Pennsylvania R. Co.* (D. C.-N. Y.), 30 Fed. Supp. 419.

The deposition of a corporate party by its representatives should ordinarily be taken at the principal place of business of the corporation. *Cohen v. Pennsylvania R. Co.* (D. C.-N. Y.), 30 Fed. Supp. 419.

In an action for negligence, it is proper for the plaintiff to examine the defendant and witnesses as to the acts said to constitute negligence. For example, in an action based on a collision between two vehicles, an examination may be had on the question whether the defendant's vehicle was mechanically defective. *Norton v. Cooper Jarrett* (D. C.-N. Y.), 11 Bull. 6, 1 Fed. R. Dec. 92.

The court may fix the place of examination before trial as to nonresidents of the district and the place of their residence is immaterial so long as they may be reached by the process of the court. Persons residing in Missouri, however, should not be compelled to attend such examination in New York and parties should not be so compelled without adequate provision for their expenses. See Rule 45 (d) (2). *Norton v. Cooper Jarrett* (D. C.-N. Y.), 11 Bull. 6, 1 Fed. R. Dec. 92.

Although neither this rule nor Rule 45 require that notice of examination before trial shall state the name of the person before whom the examination is to take place, the better practice is that the notice should name such person. *Norton v. Cooper Jarrett* (D. C.-N. Y.), 11 Bull. 6, 1 Fed. R. Dec. 92.

An examination before trial should not take place in the office of the attorney for either party. *Norton v. Cooper Jarrett* (D. C.-N. Y.), 11 Bull. 6, 1 Fed. R. Dec. 92.

A party is not entitled to examination before trial on matters within his own knowledge nor on matters admitted in adversary's pleadings. See Rule 26 (b). *Norton v. Cooper Jarrett* (D. C.-N. Y.), 11 Bull. 6, 1 Fed. R. Dec. 92.

408. Notice of Taking Deposition of Individuals (Alternative Form).

(Caption.)

Notice is hereby given that on ———, 19—, at ———. M. at [state place], before ———, a Notary Public, the attorney for the plaintiff (de-

fendant) will take the depositions of AB, whose address is —, and of CD, whose address is —.

Attorney for plaintiff (defendant).

Address.

To _____
Attorney for defendant (plaintiff).

Address.

Cross-Reference.

In connection with Forms 408 to 411,
see notes to Form 407.

409. Notice of Taking of Depositions.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that the plaintiff will take the testimony, by oral examination, of —, as a witness in behalf of the plaintiff, before —, a notary public, such examination to be taken at the office of said notary public at [address], at — — M. on the — day of —, 19—, or at such further time to which the hearing may be adjourned.

Date —.

Attorney for plaintiff.

410. Notice of Taking Deposition of Corporation.

(Caption.)

Please take notice that on — —, 19—, at — — M., at [state place], before —, a Notary Public, the attorney for plaintiff (defendant) will take the deposition of XY Corporation, whose principal office is located at —, by AB, its secretary, and CD, its general manager.

Attorney for plaintiff (defendant).

Address.

To _____
Attorney for defendant (plaintiff).

Address.

411. Notice of Taking Deposition of Corporation (Alternative Form).

(Caption.)

Notice is hereby given that on — —, 19—, at — —. M. at [state place], before — —, a Notary Public, the attorney for plaintiff (defendant), will take the deposition of XY Corporation, whose principal office is located at — —, by AB, its president, CD, its treasurer, and EF, a director of said corporation.

Attorney for plaintiff (defendant).

Address.

To _____

Attorney for defendant (plaintiff).

Address.

412. Motion to Vacate Notice for Taking of Depositions, for Failure to Obtain Leave of Court.

(Caption.)

The defendant moves the court to vacate the notice given by the plaintiff and dated — —, 19—, for the taking of depositions herein, on the ground that no answer has been served herein and leave of court has not been obtained for the taking of depositions.

Attorney for defendant.

Address.

(Notice of Motion.)

Cross-Reference.

See notes to Form 405.

Federal Rules of Civil Procedure.

"All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice." Rule 32 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 32: "This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26 provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26."

413. Motion to Vacate Notice for Taking of Depositions Because of Fatal Defect.

(Caption.)

The defendant moves the court to vacate the notice given by the plaintiff and dated — —, 19—, for the taking of depositions herein, on the ground that said notice is fatally defective in that it fails to name the

officers of the corporation whose depositions are to be taken (or state any other defect vitiating the notice).

Attorney for defendant.

Address.

(Here annex Notice of Motion.)

Cross-Reference.

See notes to Forms 405, 412.

414. Motion to Vacate Notice for Taking of Depositions, Because Deposition Has Already Been Taken.

(Caption.)

The defendant moves the court to vacate the notice given by the plaintiff and dated — —, 19—, for the taking of depositions herein, on the ground that the plaintiff has already taken the deposition of the witness named in the notice and no reason appears for taking an additional deposition.

Attorney for defendant.

Address.

(Here annex Notice of Motion.)

Cross-Reference.

See notes to Forms 405, 412.

415. Order Granting Motion to Vacate Notice.

(Caption.)

This cause was heard on motion of defendant to vacate the plaintiff's notice for the taking of depositions herein, and the court being duly advised in the premises, it is

Ordered, that the notice dated — —, 19—, heretofore given by the plaintiff for the taking of depositions be and hereby is vacated.

Date—.

United States district judge.

Cross-Reference.

In connection with Forms 415 and 416,
see notes to Form 412,

416. Order Denying Motion to Vacate Notice.

(Caption.)

This cause was heard on the defendant's motion to vacate the notice given by the plaintiff and dated —, 19—, for the taking of depositions herein, and the court being fully advised in the premises, it is

Ordered, that the motion be and hereby is denied.

Date—.

United States district judge.

417. Petition to Perpetuate Petitioner's Testimony under Rule 27(a).

District Court of the United States

— District of —.

In the matter of the application of
AB
for the perpetuation of testimony.

Civil No. —

The petition of AB respectfully shows:

I. I reside at —, and expect to be plaintiff in an action cognizable in this court. I am unable to bring it presently.

II. The subject-matter of the expected action is the foreclosure of a mortgage executed by CD to the petitioner. Before the action can be instituted it is necessary to await the probate of the will of the mortgagor, who has recently died and who devised the mortgaged property to EF.

III. The facts desired to establish by the proposed testimony are the execution of the mortgage by CD, its delivery to petitioner, and the default in the payment of interest on said mortgage.

The reason for perpetuating the testimony is that the petitioner expects to leave in a few weeks on a prolonged trip abroad and is not likely to return in time for the trial of the action.

IV. The names and addresses of the persons who petitioner expects will be adverse parties are:

EF, whose address is —.

GH, whose address is —.

JK, whose address is —.

V. The witness to be examined is the petitioner, whose address is —. The substance of the expected testimony is as stated in paragraph III hereof.

Wherefore, the petitioner prays for an order authorizing him to take his deposition in order to perpetuate his testimony.

Petitioner.

Attorney for petitioner.

Address.

(Verification.)

Cross-Reference.

Advisory note to Rule 28, see Form 405.

Federal Rules of Civil Procedure.

"A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the district court of the United States in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony." Rule 27 (a) (1).

"Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held." Rule 28 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 27 (a): "This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona v. California*, 292 U. S. 341 (1934); *Todd Engineering Dry Dock and Repair Co. v. United States*, 32 F. (2d) 734 (C. C. A. 5th, 1929); *Hull v. Stout*, 4 Del. Ch. 269 (1871). For comparable state statutes see Ark. Civ. Code (Crawford, 1934) §§ 666-670; Calif. Code Civ. Proc. (Deering, 1937) 2083-2089; Ill. Rev. Stat. (1937) ch. 51, §§ 39-46; Iowa Code (1935) §§ 11400-11407; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 233, § 46-63; N. Y. C. P. A. (1937) § 295; Ohio Gen. Code Ann. (Throckmorton, 1936) § 12216-12222; Va. Code Ann. (Michie, 1936) § 6235; Wis. Stat. (1935) §§ 326.27-326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes."

NOTES TO DECISIONS**Before Action [Rule 27 (a)].**

Where plaintiff in action for personal injuries sustained died before trial, his deposition taken by defendant in accordance with state law before removal to federal court, may be admitted. *Cervin v. W. T. Grant Co.* (C. C. A. 5), 100 Fed. (2d) 153.

Petitioner in a proceeding to perpetuate testimony in anticipation of an action for damages for wrongful death which occurred on board a tug may not be permitted to inspect and survey the tug. Discovery should be limited to the taking of testimony of person. *Egan v. Moran Towing & Transp. Co.* (D. C. N. Y.), 26 Fed. Supp. 621.

418. Petition to Perpetuate Testimony of Third Person Under Rule 27(a).

District Court of the United States

_____ District of _____

In the matter of the application of
AB
for an order to perpetuate testimony.

Civil No. _____

The petition of AB respectfully shows:

I. I reside at —, and expect to be plaintiff in an action cognizable in this court to be instituted against CD for breach of contract. I am unable to bring said action and obtain jurisdiction of said CD presently, as I am informed and believe that said CD is abroad and will not return for six months.

II. The subject-matter of the expected action is a breach of contract between the petitioner and CD, by which the parties agreed as follows: [Here state details].

III. The facts which it is desired to establish by the proposed testimony are —.

The reasons for desiring to perpetuate it are that the witness hereinafter named is a citizen and resident of a foreign country, to wit: —, and is in the United States on a temporary visit.

OR

that the witness hereinafter named is aged and infirm.

OR

that the witness hereinafter named expects shortly to leave for abroad on a prolonged visit.

IV. The name of the person who it is expected will be the adverse party is —, and his address is —.

V. The name of the person to be examined is —, and his address is —. The substance of the testimony which the petitioner expects to elicit from him is —.

Wherefore, the petitioner prays for an order authorizing him to take the deposition of the person named in the petition in order to perpetuate his testimony.

Petitioner.

Attorney for petitioner.

Address.

(Verification.)

Cross-Reference.

See notes to Form 417.

419. Notice of Application to Perpetuate Testimony.

(Caption.)

Notice is hereby given that the petitioner named in the petition herein, a copy of which is hereto annexed, will apply to the District Court of the

United States for the — District of —, on — —, 19—, at —
— M., at — for the order described in the petition.

Attorney for petitioner.

Address.

To EF.

GH.

JK.

Cross-Reference.

Advisory note to Rule 27 (a), see Form 417.

Federal Rules of Civil Procedure.

"The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or

state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply." Rule 27 (a) (2).

420. Order Directing Perpetuation of Testimony.

(Caption.)

AB having petitioned the court for an order authorizing him to take the depositions of the persons hereinafter named, for the purpose of perpetuating their testimony, and the court being satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it is hereby

Ordered, that the depositions of CD, whose address is —, and of EF, whose address is —, may be taken by the petitioner, on oral examination before —, a Notary Public, at [state place] on — —, 19—, at —
— M., concerning the following matters:

1. _____.
2. _____.

Date—.

United States district judge.

Cross-Reference.

Advisory note to Rule 27 (a), see Form 417.

Federal Rules of Civil Procedure.

"If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the

examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed." Rule 27 (a) (3).

421. Order Directing Perpetuation of Testimony of Petitioner.

(Caption.)

AB having petitioned the court for an order authorizing him to take his deposition for the purpose of perpetuating his own testimony, and the court being satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it is hereby

Ordered, that the deposition of the petitioner AB may be taken by him on oral examination before —, a notary public, at [state place], on —, 19—, at — M., concerning the following matters:

1. _____.
2. _____.

Date—.

United States district judge.**Cross-Reference.**

See notes to Form 420.

422. Motion to Perpetuate Testimony Pending Appeal.

(Caption.)

The plaintiff moves this court for leave to take depositions of the witnesses hereinafter named during the pendency of the appeal from the judgment herein to perpetuate their testimony for use in the event of further proceedings in this court.

The names and addresses of the persons to be examined are:

AB, whose address is —.

CD, whose address is —.

The substance of the testimony which the plaintiff expects to elicit from AB is —.

The substance of the testimony which the plaintiff expects to elicit from CD is —.

The reasons for perpetuating their testimony are: The complaint herein was dismissed for failure to state a claim. An appeal has been taken by the plaintiff from the judgment of dismissal and is now pending. In the event said judgment is reversed, and the action is tried on the facts, the testimony of the aforesaid witnesses will be necessary and material. The said witnesses are planning to leave shortly for an extended trip to Europe.

Attorney for plaintiff._____
Address.**Cross-Reference.**

See notes to Forms 405, 407.

Federal Rules of Civil Procedure.

"If an appeal has been taken from a judgment of a district court or before the

taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for

perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court." Rule 27 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 27 (b): "This follows the practice approved in *Richter v. Union Trust Co.*, 115 U. S. 55 (1885), by extending the right to perpetuate testimony to cases pending an appeal."

423. Order to Perpetuate Testimony Pending Appeal.

(Caption.)

The plaintiff having moved for leave to take the depositions of the witnesses hereinafter named in order to perpetuate their testimony for use in the event of further proceedings in this court, and it appearing that the perpetuation of testimony is proper to avoid a failure or delay of justice, it is

Ordered, that the plaintiff be and he is hereby allowed to take the depositions of the following witnesses:

AB, whose address is ____.

CD, whose address is ____.

Date ____.

United States district judge.

Cross-Reference.

See notes to Forms 420, 422.

424. Motion for Commission to Take Testimony in Foreign Country.

(Caption.)

The plaintiff moves this court for an order directing that a commission issue to ____, a [state title], of ____, or to some other competent person to take the depositions of the following witnesses in behalf of the plaintiff, on written interrogatories (on oral examination):

AB, whose address is ____.

CD, whose address is ____.

Attorney for plaintiff.

Address.

Note.

If an open commission, the motion should provide for the taking of depositions "of such witnesses as may be produced before him, on oral examination."

Cross-Reference.

See notes to Forms 405, 407.

Federal Rules of Civil Procedure.

"In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or con-

sular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed 'to the Appropriate Judicial Authority in [here name the country].'" Rule 28 (b).

NOTES TO DECISIONS**In Foreign Countries [Rule 28 (b)].**

As a matter of discretion, an open commission may be issued to take the oral depositions of witnesses residing abroad, if the claim arose abroad and substantially all of the witnesses reside there. *Gitto v. Societa Anonima Di Navigazione* (D. C.-N. Y.), 28 Fed. Supp. 309.

As a matter of discretion, if depositions are taken abroad, and undue travel-

ing expenses are involved, the adverse party may employ local counsel or after the depositions have been taken and examined, address written cross-interrogatories to the deponents. If the answers to the first set of cross-interrogatories are incomplete, leave to file further cross-interrogatories may be sought. *Gitto v. Societa Anonima Di Navigazione* (D. C.-N. Y.), 28 Fed. Supp. 309.

425. Order Granting Motion for Commission.

(Caption.)

The plaintiff having moved that a commission issue to take the depositions of the witnesses hereinafter named, and the court being duly advised, it is hereby

Ordered, that a commission issue directed to — of —, to examine under oath on written interrogatories to be thereunto annexed, AB of —, and CD of —, witnesses in behalf of the plaintiff.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 424.

426. Commission to Take Depositions.

(Caption.)

The United States of America, }
 — District of —. } ss:

The President of the United States of America to Hon. AB, Consul-General of the United States, at —, —, Greeting:

Know ye, That we, with full confidence in your prudence and fidelity, have appointed you commissioner and do hereby give you full power and authority to examine upon his oath or affirmation, to be taken before you, John Doe, as a witness in behalf of the plaintiff in an action now pending in the District Court of the United States for the — District of —, wherein AB is plaintiff and CD is defendant, on the interrogatories hereto annexed.

And we do hereby require you to reduce the testimony of the said John Doe to writing, to seal it up, and return the same with this commission, addressed to the clerk of the District Court of the United States for the — District of —, at —, —, as soon as may be convenient.

(Add teste.)

Cross-Reference.

In connection with Forms 426 to 430,
see notes to Form 424.

427. Motion for Letters Rogatory.

(Caption.)

The plaintiff moves this court for an order directing that letters rogatory issue addressed to the appropriate judicial authority in Brazil to examine on written interrogatories to be thereunto annexed, AB of —, and CD of —, witnesses in behalf of the plaintiff.

Attorney for plaintiff.

Address.

428. Order Granting Motion for Letters Rogatory.

(Caption.)

The plaintiff having moved this court that letters rogatory issue to examine on written interrogatories the witnesses hereinafter named, it is hereby

Ordered, that letters rogatory issue addressed to the appropriate judicial authority in Brazil to examine on written interrogatories to be thereunto annexed, AB of —, and CD of —, witnesses in behalf of the plaintiff.

Date—.

United States district judge.

429. Letters Rogatory.

(Caption.)

United States of America, }
— District of —. } ss:

The President of the United States of America to the appropriate judicial authority in —, —, Greeting:

Whereas, an action is pending in the United States District Court for the — District of —, in which AB is plaintiff and CD is defendant, and it has been suggested that justice can not completely be done between the said parties without the testimony of EF and GH, who reside at —, within your jurisdiction;

It is therefore requested that, in furtherance of justice and by the proper and usual process of your court, you will cause said EF and GH to appear before you, or some competent person appointed and authorized by you, for that purpose, at a time and place to be fixed by you, then and there to make answer on oath or affirmation to the several interrogatories hereto annexed; and that you will cause their depositions to be reduced to writing and to be returned under cover, addressed to the clerk of the District Court of the United States for the — District of —, at the city of —, state of —, United States of America, duly sealed together with these presents; and we shall be ready and willing to do the same for you in a similar case when required.

(Add teste.)

430. Stipulation to Take Depositions.

(Caption.)

It is hereby stipulated and agreed that depositions may be taken herein in behalf of the plaintiff, on oral examination, of such witnesses as may be produced by plaintiff, before —, a Notary Public, at his office at —, on — —, 19—, at — —. M. and that the taking of depositions proceed from day to day.

Attorney for plaintiff.

Address.

Attorney for defendant.

Address.

Federal Rules of Civil Procedure.

"If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any no-

tice, and in any manner and when so taken may be used like other depositions." Rule 29.

NOTES TO DECISIONS

In General.

Although a party stipulates as to the officer before whom a deposition shall be taken, he should be relieved of his stipulation as to further taking of testimony if it appears subsequently that

such officer is disqualified and there are misgivings as to the fidelity with which the functions of the office have been performed. *Laverett v. Continental Briar Pipe Co.* (D. C.-N. Y.), 25 Fed. Supp. 80, 790.

431. Motion for Order That Deposition Be Not Taken and to Limit Examination.

(Caption.)

The defendant moves this court for an order directing that the deposition of —, referred to in the notice served by plaintiff and dated — —, 19—, shall not be taken, on the ground that —.

OR

that the deposition of —, pursuant to notice served by plaintiff and dated — —, 19—, may be taken only in —, on the ground that said city is located in — County, of which said — is a resident.

OR

that the deposition of —, pursuant to notice served by plaintiff and dated — —, 19—, may be taken only on written interrogatories, on the ground that the place at which said deposition is to be taken is far distant from the place of trial, and the defendant is unable to bear the expense of being represented by counsel at said hearing.

OR

that at the taking of the deposition of —, pursuant to notice served by plaintiff and dated — —, 19—, the following matters shall not be inquired into: — on the ground that —.

OR

that the scope of the examination of —, pursuant to notice served by plaintiff and dated — —, 19—, shall be limited to the following matters: —, on the ground that —.

OR

that the examination of —, pursuant to notice served by plaintiff and dated — —, 19—, shall be held with no one present except the parties to the action and their officers and counsel, on the ground that the nature of this action is —, and that the nature of the testimony is likely to be such that it is contrary to the public interest that persons having no connection with the litigation should be admitted to the hearing.

OR

that after being sealed, the deposition shall be opened only by order of the court, on the ground —.

OR

that at the examination of —, pursuant to notice served by plaintiff and dated — —, 19—, secret processes, developments, or research need not be disclosed, on the ground that this action is brought to enjoin alleged unfair competition and that the business in which defendant is engaged comprises certain secret processes, developments, and research produced by defendant at great labor and expense, and that the value of said secret

processes, developments, and research would be completely destroyed if they were to be disclosed and made public.

OR

that the plaintiff file with the clerk of the court in a sealed envelope to be opened as directed by the court, the alleged date of the invention referred to in the patent herein, on the ground that this is an action based on patent infringement and the defendant contends the patent in suit is invalid, as anticipated by prior public use.

Attorney for defendant.

Address.

Cross-Reference.

See notes to Form 432.

Federal Rules of Civil Procedure.

"After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall

be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." Rule 30 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 30 (b) and (d): "These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26."

NOTES TO DECISIONS

Orders for the Protection of Parties and Deponents [Rule 30 (b)].

The power of the District Court to order that depositions shall not be taken in a pending action is discretionary and mandamus will not lie to compel the judge to vacate such an order. *National Bondholders Corp. v. McClintic* (C. C. A. 4), 99 Fed. (2d) 595.

The powers given to the court by Rule 30 (b) and (d) to limit and terminate examinations are for the protection of parties and deponents, and are not to be made the basis of an application to the court in every case, but only where bad faith, annoyance, embarrassment, or oppression are the purpose of the examination. *Laverett v. Continental Briar Pipe Co.* (D. C.-N. Y.), 25 Fed. Supp. 80, 790.

In a personal injury action, plaintiff's motion that defendant's examination of the plaintiff before trial be restricted to the manner of the happening of the accident, and exclude inquiry as to the names and addresses of any of the witnesses thereto, should be denied in the absence of any showing that the examination is being conducted in bad faith or in such a manner as to annoy, harass, or oppress the plaintiff. *Stankewicz v. Pillsbury Flour Mills Co.* (D. C.-N. Y.), 26 Fed. Supp. 1003.

As a matter of discretion, the court will not permit inspection by examining counsel of papers produced in response to a subpoena duces tecum by a witness whose deposition is being taken and who is not a party to the action, if the papers

are not admissible in evidence and their disclosure might seriously embarrass or prejudice the witness. *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.* (D. C.-N. Y.), 27 Fed. Supp. 121.

Examinations before trial should conform to rules of evidence. *Union Cent. Life Ins. Co. v. Burger* (D. C.-N. Y.), 27 Fed. Supp. 556.

Preference of defendant for deposition of witness on oral examination instead of written was a reasonable choice. *Clair v. Philadelphia Storage Battery Co.* (D. C.-Pa.), 27 Fed. Supp. 777.

The new rules should govern the taking of depositions after their effective date although the action was commenced prior to such date. *Clair v. Philadelphia Storage Battery Co.* (D. C.-Pa.), 27 Fed. Supp. 777.

The oral deposition of a witness residing at a distance should be taken at the place of trial if the witness consents and the adverse party so requests. *Clair v. Philadelphia Storage Battery Co.* (D. C.-Pa.), 27 Fed. Supp. 777.

The taking of depositions by a party who is guilty of laches should be conditioned on its causing no delay in the trial. *Norton v. Cooper Jarrett* (D. C.-N. Y.), 27 Fed. Supp. 806.

The "contention" of a party is made by pleadings and is not a proper subject of examination by deposition. It may, however, be obtained by a motion for a bill of particulars. *Norton v. Cooper Jarrett* (D. C.-N. Y.), 27 Fed. Supp. 806.

A party proceeding to take depositions may not move to limit the scope of the examination. *Barrezueta v. Sword S. S. Line* (D. C.-N. Y.), 27 Fed. Supp. 935.

Inconvenience to the party whose deposition is to be taken is not a valid objection to the taking of his deposition. *Goldberg v. Raleigh Mfrs.* (D. C.-Mass.), 28 Fed. Supp. 975.

In an action for patent infringement, defendant was not precluded, in taking depositions, from inquiring into the date of plaintiff's invention without simultaneously disclosing date of prior use on which it intends to rely. The contention that such information might be used to perpetrate a fraud on plaintiff was found to be without merit. *Chemo-Mechanical Water Imp. Co. v. Milwaukee* (D. C.-Wis.), 29 Fed. Supp. 45.

In an action for personal injuries, defendant's attorney at the taking of his deposition must produce for inspection by plaintiff's attorney a statement pre-

viously given by the plaintiff to the defendant's insurer, if such statement is in the possession of defendant's attorney. *Bough v. Lee* (D. C.-N. Y.), 29 Fed. Supp. 498.

If the notice to take deposition discloses the exact nature of the information sought and it appears that such information is irrelevant, the court may order that the deposition shall not be taken, instead of deferring the matter to the taking of the deposition. *Rose Silk Mills, Inc. v. Insurance Co. of North America* (D. C.-N. Y.), 29 Fed. Supp. 504.

Upon a proper showing, a deponent may obtain a limitation of the scope of his examination before the time specified in the notice for taking the deposition or during the examination he may move the court to stop it or limit the scope and manner thereof. *Madison v. Cobb* (D. C.-Pa.), 29 Fed. Supp. 881.

The taking of depositions should not be postponed until a complete bill of particulars has been furnished, it appearing that an order precluding testimony has already been made. *Piccard v. Sperry Corp.* (D. C.-N. Y.), 30 Fed. Supp. 171.

The deposition of a corporate party by its representative should ordinarily be taken at the principal place of business of the corporation. *Cohen v. Pennsylvania R. Co.* (D. C.-N. Y.), 30 Fed. Supp. 419.

A notice to take depositions should not be vacated on a mere allegation, without proof, that the examination was sought in bad faith or would subject the party to a penalty or forfeiture. If these facts appear while the examination is in progress, the examination may be then terminated. *Zuckerman v. Pilot* (D. C.-N. Y.), 60 Bull. 8, 1 Fed. R. Dec. 130.

Defendant was permitted to examine officers of plaintiff corporation as to allegations in the complaint that former employees of plaintiff revealed trade secrets to defendant together with information as to plaintiff's sources of supply and the details of plaintiff's proposed bid on government contracts, even though such examination may involve disclosing plaintiff's trade secrets. *Radio Receptor Co., Inc. v. General Motors Corp.* (D. C.-N. Y.), 64 Bull. 51, 1 Fed. R. Dec. 130.

Although plaintiff in an action for damages to his business alleges that he has been in such business "for the past

four years," general evidence regarding the growth, financial condition, and relative position of plaintiff in the field is relevant and examinations before trial of officers of plaintiff corporation should

not be limited as to the four-year period. *Radio Receptor Co., Inc. v. General Motors Corp.* (D. C.-N. Y.), 64 Bull. 51, 1 Fed. R. Dec. 130.

432. Motion to Terminate or Limit Examination.

(Caption.)

The defendant moves this court for an order directing —, the officer who is conducting the examination of —, pursuant to notice served by plaintiff and dated — —, 19—, to cease forthwith from taking the deposition, or in the alternative limiting the scope or manner of taking the deposition, on the ground that the examination is being conducted in bad faith and in such manner as unreasonably to annoy, embarrass, and oppress the deponent.

Attorney for defendant.

Address.

Cross-Reference.

See notes to Form 431.

Federal Rules of Civil Procedure.

"At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the

scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable." Rule 30 (d).

NOTES TO DECISIONS

Motion to Terminate or Limit Examination [Rule 30 (d)].

In an action by a salesman for the recovery of commissions claimed to have been earned, where many applications for bill of particulars were made, and the bills filed were insufficient to apprise the defendant of the claims made; and commissions omitted, plaintiff's motion to vacate the notice of examination will be denied. *Newcomb v. Universal Match Corp.* (D. C.-N. Y.), 25 Fed. Supp. 169.

A motion to terminate or limit examination is denied in view of the production of certain documents directed by the

court, and answers by the witness. *Flordin v. Attapulugus Clay Co.* (D. C.-Del.), 26 Fed. Supp. 968.

Motion to terminate the taking of the deposition of a party or in the alternative to limit such examination to written interrogatories concerning certain specified matters should be denied if the party seeking the examination is entitled to a general examination of his adversary, and if the examination had proceeded for only a short time. *Newcomb v. Universal Match Corp.* (D. C.-N. Y.), 27 Fed. Supp. 937.

If a refusal to answer questions or produce documents at an examination before trial is not wilful but was based on advice of counsel, the witness should be directed to answer, and a motion to punish him for contempt should be denied. *Newcomb v. Universal Match Corp.* (D. C.-N. Y.), 27 Fed. Supp. 937.

That the giving of the testimony sought by notice to take depositions will require disclosure of secret processes is not a ground for vacating the notice. Such objection may be presented at proper time by motion to terminate or limit the examination. *Nakrasoff v. United States Rubber Co.* (D. C.-N. Y.), 27 Fed. Supp. 953.

A motion for the production of voluminous documents and for taking of lengthy depositions made four years after institution of suit, during which

time an action involving substantially the same issues was commenced in another court in which depositions were taken, should be denied. Pretrial procedure for a simplification of the issues was suggested. *Cumberland Corp. v. McLellan Stores Co.* (D. C.-N. Y.), 27 Fed. Supp. 994.

The scope of an examination before trial should not be limited on a motion to modify the notice before the examination. If it thereafter appears that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the examination may be suspended for the presentation of a motion to terminate or limit the examination. *Krier v. Muschel* (D. C.-N. Y.), 29 Fed. Supp. 482.

433. Order Terminating or Limiting Examination.

(Caption.)

This cause came on for hearing on a motion of defendant to terminate the examination of —, which was being conducted before —, pursuant to notice served by plaintiff and dated —, 19—, and it appearing that said examination is being conducted in such manner as unreasonably to annoy, embarrass, and oppress the deponent, it is hereby

Ordered, that —, who is conducting the examination of —, cease forthwith from taking the deposition.

OR

that at the examination of — the following matters shall not be inquired into: —.

OR

that the examination of — shall be held with no one present except the parties to the action and their officers and counsel.

United States district judge.

Date—.

Cross-Reference.

See notes to Forms 431, 432.

434. Order Fixing Place of and Limiting Examination.

(Caption.)

The defendant having moved that —, and the court being duly advised, it is hereby

Ordered, that the deposition of —, referred to in the notice served by plaintiff and dated — —, 19—, shall not be taken.

OR

that the deposition of —, pursuant to notice served by plaintiff and dated — —, 19—, may be taken only at —; and such that said deposition shall be taken before [name person], at his office at —, —, on — —, 19—, at — —. M.

OR

that the deposition of —, at the instance of the plaintiff may be taken only on written interrogatories.

OR

that at the taking of the deposition of —, the following matters shall not be inquired into: —.

OR

that the scope of the examination of —, pursuant to notice served by plaintiff and dated — —, 19—, shall be limited to the following matters: —.

OR

that the examination of —, pursuant to notice served by plaintiff and dated — —, 19—, shall be held with no one present except the parties to the action, their officers, and counsel.

OR

that after being sealed, the deposition of —, to be taken pursuant to notice served by plaintiff and dated — —, 19—, shall be opened only by order of the court.

OR

that at the taking of the deposition of —, secret processes, developments, or research need not be disclosed.

OR

that the plaintiff shall file with the clerk of this court in a sealed envelope the alleged date of the invention covered by the patent in suit; that simultaneously therewith the defendant file with the clerk of this court in a sealed envelope the date or dates of each public use on which he intends to rely in support of his defense; that said envelopes shall be opened as directed by the court.

United States district judge.

Date—.

Cross-Reference.

See notes to Forms 431, 432.

435. Deposition.

(Caption.)

Deposition of John Doe, taken on — —, 19—, before AB [title], at —, pursuant to the order dated — —, 19—, made on motion of

defendant herein, copy of which is hereto annexed (or pursuant to notice served herein by plaintiff and dated — —, 19—, a copy of which is hereto annexed).

Appearances:

Attorney for defendant.

Attorney for plaintiff.

John Doe, being first duly sworn, testified as follows:

Direct examination by Mr. —.

q. —

a. —

Mr. —: I object on the ground that the question calls for privileged information, in that —.

Cross-examination by Mr. —.

q. —

a. —

Redirect examination by Mr. —.

q. —

a. —

Recross-examination by Mr. —.

q. —

a. —

John Doe

Subscribed and sworn to before me this — day of —, 19—.

AB.

Title.

Cross-Reference.

Advisory note to Rule 32(d), see Form 412.

Federal Rules of Civil Procedure.

"The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall

be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim." Rule 30 (c).

"When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the

witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part." Rule 30 (e).

"Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed,

certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained." Rule 32 (d).

NOTE OF ADVISORY COMMITTEE TO RULE 30 (c) and (e): "These follow the general plan of Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U. S. C., Title 28, §§ 640 (Depositions de bene esse; mode of taking), and 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also Equity Rule 50 (Stenographer—Appointment—Fees)."

NOTES TO DECISIONS

As to Completion and Return of Deposition [Rule 32 (d)].

Stipulation that a deposition shall be taken before a person otherwise disqualified under Rule 28 (c) operates as a waiver of such disqualification and a motion to suppress the evidence already taken should be overruled. *Laverett v. Continental Briar Pipe Co.* (D. C.-N. Y.), 25 Fed. Supp. 80, 790.

Record of Examination—Oath—Objections [Rule 30 (c)].

A motion to vacate a notice to take a deposition, on the ground that the evidence sought would not be admissible, will not be granted unless it clearly appears that the evidence is privileged or irrelevant. *Union Cent. Life Ins. Co. v. Burger* (D. C.-N. Y.), 27 Fed. Supp. 556.

The better practice in respect to objections to the admissibility of evidence sought on examination before trial is to raise them during the examination or

when the deposition is used at the trial. *Union Cent. Life Ins. Co. v. Burger* (D. C.-N. Y.), 27 Fed. Supp. 556.

Objection to an examination before trial on the ground that the person sought to be examined is an infant 16 years of age can not be sustained. *Union Cent. Life Ins. Co. v. Burger* (D. C.-N. Y.), 27 Fed. Supp. 556.

As a matter of discretion, if depositions are taken abroad, and undue traveling expenses are involved, the adverse party may employ local counsel or after the depositions have been taken and examined, address written cross-interrogatories to the deponents. If the answers to the first set of cross-interrogatories are incomplete, leave to file further cross-interrogatories may be sought. *Gitto v. Societa Anonima Di Navigazione* (D. C.-N. Y.), 27 Fed. Supp. 785.

That a party can obtain the desired information by written interrogatories is not a valid objection to taking depositions. *Goldberg v. Raleigh Mfrs., Inc.* (D. C.-Mass.), 28 Fed. Supp. 975.

436. Certificate of Deposition of Officer before Whom Taken.

(To be appended to each deposition.)

State of _____, }
County of _____, } ss:

I, AB [title], hereby certify that I was designated, by order dated _____, 19—, (or by notice duly served), to take the deposition of John Doe

as a witness in this action; that the said John Doe was first duly sworn by me; and that the foregoing deposition is a true record of the testimony given by him.

AB.

Title.

Date—.

INDORSEMENT ON ENVELOPE CONTAINING DEPOSITION

(Caption.)
Deposition of John Doe

Cross-Reference.

See notes to Form 435.

Federal Rules of Civil Procedure.

"The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with

the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing." Rule 30 (f) (1).

NOTE OF ADVISORY COMMITTEE TO RULE 30 (f): "Compare Equity Rule 55 (Depositions Deemed Published When Filed)."

437. Notice of Motion to Suppress Deposition.

(Caption.)

Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M. or as soon thereafter as counsel can be heard, plaintiff will move this court at — — for an order suppressing the deposition of John Doe, a witness herein, taken on — —, 19—, before AB, at — —, on the grounds that the time specified in the notice for taking said deposition was such as to allow plaintiff's attorney insufficient time in which to travel to said place, and the said AB is not a person before whom depositions may be taken.

Attorney for plaintiff.

Address.

Date—.

Cross-Reference.

Advisory note to Rule 32 (b), see Form 412.

Federal Rules of Civil Procedure.

"Objection to taking a deposition because of disqualification of the officer

before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence." Rule 32 (b).

438. Order Suppressing Deposition.

(Caption.)

This cause was heard on plaintiff's motion to suppress the deposition of John Doe, a witness herein, taken on ———, 19—, before AB, at ———, pursuant to notice dated ———, 19—, and it appearing to the court that the time specified in said notice did not allow plaintiff's attorney sufficient time in which to travel to the place of the taking of said deposition, and that the said AB was not a person before whom depositions may be taken, and the court being fully advised, it is

Ordered, that the deposition of John Doe, taken on ———, 19—, before AB, at ———, be and the same is hereby suppressed.

United States district judge.

Date——.

Cross-Reference.

See notes to Form 437.

439. Notice of Filing of Depositions.

(Caption.)

Attorney for defendant.

Address.

Please take notice that the depositions of AB, CD, and EF, heretofore taken on behalf of plaintiff, were filed herein on ———, 19—.

Attorney for plaintiff.

Address.

Cross-References.

See notes to Form 435.

Advisory note to Rule 30 (f), see Form 436.

Federal Rules of Civil Procedure.

"The party taking the deposition shall give prompt notice of its filing to all other parties." Rule 30 (f) (3).

440. Motion for Expenses for Failure to Attend Taking of Deposition.

(Caption.)

Defendant moves the court for an order directing plaintiff to pay to defendant the reasonable expenses incurred by defendant and his attorney, including reasonable attorney's fees, amounting in the aggregate to the

sum of — dollars (\$—), in attending, pursuant to notice given by plaintiff for the taking of depositions, and dated — —, 19—, on the ground that plaintiff failed to attend and proceed with the taking of said depositions.

Attorney for defendant.

Address.

(Here Annex Notice of Motion.)

Federal Rules of Civil Procedure.

"If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable

expenses incurred by him and his attorney in so attending, including reasonable attorney's fees." Rule 30 (g) (1).

NOTE OF ADVISORY COMMITTEE TO RULE 30 (g): "This is similar to 2 Minn. Stat. (Mason, 1927) § 9833, but is more extensive."

441. Order for Payment of Expenses for Failure to Attend Taking of Depositions.

(Caption.)

This cause was heard on motion of defendant to require plaintiff to pay the expenses of defendant and his attorney in attending, pursuant to notice for the taking of depositions herein, and it appearing to the court that plaintiff gave notice to defendant of the taking of depositions at —, on — —, 19—, that defendant and his attorney appeared for the taking of said depositions at the time and place designated in said notice and plaintiff failed to attend and proceed therewith, it is

Ordered, that plaintiff pay to defendant the sum of — dollars (\$—) as reasonable expenses and attorney's fee incurred by him, as aforesaid.

United States district judge.

Date—.

Cross-Reference.

See notes to Form 440.

442. Motion for Expenses for Failure to Serve Subpoena upon Witness.

(Caption.)

Plaintiff moves the court for an order directing defendant to pay to plaintiff as expenses incurred by him and his attorney, including an attorney's fee, amounting in the aggregate to the sum of — dollars (\$—), in attending, pursuant to notice, to take depositions herein, on the grounds that defendant gave plaintiff notice of the taking of the deposition of John Doe as a witness herein at —, on — —, 19—, at — —. M., that

plaintiff and his attorney appeared for the taking of the said deposition at the time and place designated in said notice, but the said John Doe did not attend, because of defendant's failure to serve a subpoena upon him.

Attorney for plaintiff.

Address.

Cross-Reference.

Advisory note to Rule 30 (g), see Form 440.

Federal Rules of Civil Procedure.

"If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not

attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees." Rule 30 (g) (2).

443. Order Directing Payment of Expenses for Failure to Subpoena Witness.

(Caption.)

This cause was heard on plaintiff's motion to require defendant to pay to plaintiff the reasonable expenses incurred by him and his attorney in attending, pursuant to notice for the taking of a deposition herein, and it appearing to the court that defendant gave plaintiff notice of the taking of the deposition of John Doe as a witness herein at —, on — —, 19—, at — — M., that plaintiff and his attorney appeared for the taking of the deposition at the time and place designated in the said notice, but the said John Doe did not attend, because of defendant's failure to serve a subpoena upon him, it is

Ordered, that defendant be and he is hereby directed to pay to plaintiff the sum of — dollars (\$—) as reasonable expenses and attorney's fee, incurred as aforesaid.

United States district judge.

Date—.

Cross-Reference.

See notes to Form 442.

444. Notice of Taking Deposition of Witness upon Interrogatories.

(Caption.)

Attorney for defendant.

Address.

Please take notice that annexed hereto are written interrogatories to be addressed to John Doe of —, at the taking of his deposition as a witness herein, before AB, Notary Public, at the office of the said AB, at —.

Attorney for plaintiff.

Address.

Cross-Reference.

See notes to Form 405.

Federal Rules of Civil Procedure.

"A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days

thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition." Rule 31 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 31: "This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26 (a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26 (a)."

NOTES TO DECISIONS

Serving Interrogatories [Rule 31 (a)].

Deposition held inadmissible against defendants on whom notice of the taking of the deposition had been served, but not a notice that they had any concern in the taking of the deposition or that it was to be taken or was intended to be offered or used as against them or either of them. *United States v. Aluminum Co.* (D. C.-N. Y.), 27 Fed. Supp. 820.

That the giving of the testimony sought by notice to take depositions will require disclosure of secret processes is

not a ground for vacating the notice. Such objection may be presented at proper time by motion to terminate or limit the examination. *Nakrasoff v. United States Rubber Co.* (D. C.-N. Y.), 27 Fed. Supp. 953.

Defendant's attorney may refuse to answer questions as to the identity and location of witnesses if the only information he has was obtained from the defendant and hence is confidential and privileged. *Rowe v. Union Cent. Life Ins. Co.* (D. C.-D. C.), 15 Bull. 15.

445. Direct Interrogatories to Witness.

(Caption.)

Interrogatories to be administered to AB of —, a witness to be examined pursuant to the commission directed to be issued by order entered herein on — —, 19—, proposed on behalf of the plaintiff (defendant).

1. State your name, age, occupation, and place of residence.
2. _____.

3. _____.

Attorney for _____._____
Address.

Date_____.

Note.

A party upon whom direct interrogatories are served has ten days within which to serve cross-interrogatories upon the moving party. Rule 31 (a).

Cross-Reference.

In connection with Forms 445 to 451, see notes to Form 444.

446. Notice of Motion for Enlargement of Time to Serve Cross-Interrogatories.

(Caption.)

Attorney for plaintiff._____
Address.

Please take notice that on _____, 19—, at _____ M., or as soon thereafter as counsel can be heard, defendant will move this court at _____ for an order permitting him to serve cross-interrogatories in this action notwithstanding the expiration of the period prescribed therefor, on the ground that the failure to serve the cross-interrogatories within the time prescribed was the result of excusable neglect, as more fully appears from the annexed affidavit of _____, sworn to on _____, 19—.

Attorney for defendant._____
Address.

Date_____.

447. Order Enlarging Time to Serve Interrogatories.

(Caption.)

This cause was heard on motion of defendant after notice for an order permitting him to serve cross-interrogatories notwithstanding the expiration of the period prescribed therefor, and it appearing to the court that defendant's failure to file said cross-interrogatories was the result of excusable neglect, and the court being fully advised, it is

Ordered, that the period within which defendant may serve cross-interrogatories herein be and the same is hereby extended to and including _____, 19—.

United States district judge.

Date_____.

Note.

For requirement that this kind of an order set forth that it was made upon motion after notice and that it contain a finding by the court that failure to act

within the time prescribed was the result of excusable neglect, see *Ainsworth v. Gill Glass & Fixture Co.* (C. C. A. 3), 104 Fed. (2d) 83.

448. Notice of Cross, Redirect, or Recross Interrogatories to be Addressed to a Witness.

(Caption.)

Attorney for——.

Address.

Please take notice that annexed hereto are cross (redirect or recross) interrogatories to be addressed to AB of —, a witness to be examined pursuant to the commission directed to be issued by order entered herein on — —, 19— (or pursuant to notice to take deposition on written interrogatories served herein on — —, 19—,) on behalf of plaintiff (defendant).

Attorney for ——.

Address.

Date——.

449. Notice of Cross, Redirect, and Recross Interrogatories.

(Caption.)

Attorney for——.

Address.

Please take notice that annexed hereto are cross (redirect or recross) written interrogatories to be addressed to John Doe of —, at the taking of his deposition as a witness herein before AB, Notary Public at his office at —.

Attorney for ——.

Address.

450. Cross, Redirect, and Recross Interrogatories to Witness.

(Caption.)

Cross (redirect or recross) interrogatories to be administered to AB of —, a witness to be examined pursuant to the commission directed to

be issued by order entered herein on ———, 19—, proposed on behalf of defendant (plaintiff).

1. If on direct (cross or redirect) examination your answer to the ——— interrogatory was "yes," please state ———.

2. ———.

3. ———.

Attorney for ———.

Address.

Date——.

Note.

A party served with cross-interrogatories has five days within which to serve redirect interrogatories, and a party served with redirect interrogatories has three days within which to serve recross interrogatories. Rule 31 (a).

Federal Rules of Civil Procedure.

"A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposi-

tion to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him." Rule 31 (b).

"When deposition is filed the party taking it shall promptly give notice thereof to all other parties." Rule 31 (c).

451. Motion for Protection of Deponents Testifying on Written Interrogatories.

(Caption.)

Defendant moves this court for an order directing that the deposition of John Doe as a witness herein, on written interrogatories served by plaintiff and dated ———, 19—, shall not be taken on the ground that ———.

OR

that the deposition of the witness, John Doe, on written interrogatories served by plaintiff and dated ———, 19—, shall not be taken before AB, Notary Public, the officer designated in the notice, on the ground that the said AB is a relative of the attorney for the plaintiff, to wit: A nephew.

OR

that the deposition of the witness, John Doe, on written interrogatories served by plaintiff herein and dated ———, 19—, shall not be taken except upon oral examination on the ground that ———.

Attorney for defendant.

Address.

Federal Rules of Civil Procedure.

"After the service of interrogatories and prior to the taking of the testimony

of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon

notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before

the officer designated in the notice or that it shall not be taken except upon oral examination." Rule 31 (d).

NOTES TO DECISIONS

Orders for the Protection of Parties and Deponents [Rule 31 (d)].

Court's discretion to require that a deposition be taken on oral examination should be exercised when direct interrogatories are so numerous and involved, as to make it practically impossible to

frame cross-interrogatories. *Fall Corp. v. Yount-Lee Oil Co.* (D. C.-Tex.), 24 Fed. Supp. 765.

An order that deposition should not be taken should not be made except upon good cause shown. *Spotts v. O'Neil* (D. C.-N. Y.), 30 Fed. Supp. 669.

452. Order for Protection of Deponents Testifying on Written Interrogatories.

(Caption.)

This cause was heard on defendant's motion for an order directing that the deposition of the witness, John Doe, on written interrogatories served by plaintiff herein be not taken, and the court being fully advised, it is

Ordered, that the deposition on written interrogatories of John Doe as a witness herein, pursuant to notice served by plaintiff and dated —, 19—, shall not be taken.

OR

Ordered, that the deposition on written interrogatories of John Doe as a witness in this action, pursuant to notice served by plaintiff and dated —, 19—, shall not be taken before AB, Notary Public, the officer designated in said notice, but said deposition shall be taken before Honorable —, United States Commissioner for the — District of —.

OR

Ordered, that the deposition of John Doe as a witness herein, pursuant to notice served by plaintiff and dated —, 19—, shall not be taken on written interrogatories, but may be taken on oral examination.

United States district judge.

Date—.

Cross-Reference.

See notes to Form 451.

SECTION 2

INTERROGATORIES

Form

455. Interrogatories to a party.

456. —English practice.

Form

457. Interrogatories propounded by defendant to plaintiff.

Form

458. Motion to extend time to answer interrogatories.

459. Order extending time to answer interrogatories.

460. Objections to interrogatories to a party.

Form

461. Order overruling objections to interrogatories.

462. Answers to interrogatories served on plaintiff by defendant.

463. Answers to interrogatories to a party, English practice.

INTRODUCTION.—The use of interrogatories, which prevailed in a limited form only on the equity side of the court prior to September 16, 1938, was extended to all civil actions by Rule 33 of the Federal Rules of Civil Procedure. Moreover, the practice was considerably liberalized and broadened. The scope of the remedy was made coextensive with that of depositions under Rule 26.

Interrogatories may be invoked to secure evidence in support of the claim or defense of the party serving them, to procure data that may be useful in discovering or obtaining such evidence, and to elicit information concerning the claim or defense of the adverse party. They are not limited to ultimate facts, but may be invoked to secure evidentiary matter.

455. Interrogatories to a Party.

(Caption.)

To _____

Attorney for ____.

Address.

Interrogatories on behalf of plaintiff AB (or defendant CD) to be answered under oath by defendant EF (or plaintiff GH):

1. Does the drawing forming part of the patent in suit correctly illustrate the structure described and claimed as your invention?

2. Does the attached drawing marked Exhibit "B," which is a drawing of the structure manufactured by defendant, truly represent the structure which plaintiff considers to be an infringement of the patent in suit?

(The foregoing two interrogatories have been addressed to plaintiff in a patent suit.)

3. State names and addresses of persons or firms by whom you were employed prior to the time of the alleged publication referred to in the complaint.

4. State names and addresses of your employers since the time of the alleged publication referred to in the complaint.

5. State when, where, and in what manner former employers ceased to employ and shunned you, as alleged in the complaint.

(The foregoing three interrogatories have been addressed to plaintiff seeking special damages in an action for slander.)

6. Was John Doe of —, employed as agent of defendant during the period from — —, 19—, to — —, 19—, for the purpose of reading manuscripts submitted to defendant for publication?

7. Did John Doe receive the manuscript of plaintiff's story referred to in the complaint?

8. Did John Doe read the manuscript of plaintiff's story?

(The foregoing three interrogatories have been addressed to defendant in an action involving plagiarism.)

9. State the names and addresses of persons or firms from whom defendant purchased the — machines now in use in defendant's factory at —.

(The foregoing interrogatory is appropriate to be addressed to the defendant in a patent suit.)

10. State in what respect it is claimed by defendant that the description in the patent is defective.

11. State the dates on which the plaintiff claims to have made his invention.

12. State the dates of each alleged prior public use on which defendant relies, the place where each such use took place, the person or persons participating therein, and the nature of each such public use.

(The foregoing interrogatories may be used in patent suits when appropriate to the issues.)

13. Was AB, who signed in behalf of the defendant the contract referred to in the complaint, employed by defendant on — —, 19—. If so, state in what capacity AB was employed and the nature of his duties.

14. State whether the contract referred in the complaint was oral or in writing, and give the date on which it is claimed to have been made.

(The foregoing interrogatories may be used in an action on contract when appropriate.)

15. State in what respect it is claimed that the defendant was negligent.

16. Enumerate in itemized form the medical and hospital expenses claimed to have been incurred by plaintiff as a result of the accident referred to in the complaint, stating the date, amount, and purpose of each payment, and the name of the person to whom it was made.

17. State how long plaintiff was confined to the — Hospital, and how long he was confined to his home as a result of the accident referred to in the complaint.

18. By whom was plaintiff employed at the time of the accident referred to in the complaint, in what capacity, and at what compensation?

19. For how long a period was plaintiff disabled from continuing in his employment as a result of the accident referred to in the complaint?

20. At what rate of speed was plaintiff's (defendant's) automobile driven at the time of the accident referred to in the complaint?

21. Who was the driver of plaintiff's (defendant's) automobile at the time of the accident referred to in the complaint, and what was the relation between him and the plaintiff (defendant)?

22. State the details of the damages claimed to have been sustained by plaintiff's (defendant's) automobile as a result of the accident referred to in the complaint.

23. State the names and addresses of all persons who were in the plaintiff's (defendant's) automobile at the time of the accident referred to in the complaint.

24. Was AB, the driver of defendant's automobile at the time of the accident, employed by defendant, and if so in what capacity?

25. Where and for what purpose was AB driving the defendant's automobile at the time of the accident referred to in the complaint?

26. State the names and addresses of all physicians and surgeons consulted by plaintiff in connection with the injuries sustained as a result of the accident referred to in the complaint.

27. State the diagnosis of the injuries sustained by the plaintiff as a result of the accident referred to in the complaint.

28. State in what respect and to what extent the plaintiff sustained a permanent disability as a result of the accident referred to in the complaint.

29. State in itemized form the payments made by the plaintiff to repair his automobile as a result of the accident referred to in the complaint.

(The foregoing interrogatories may be used in a tort action as appears appropriate.)

Attorney for —.

Address.

Date—.

Cross-Reference.

See notes to Form 405.

Federal Rules of Civil Procedure.

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court,

on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party." Rule 33.

NOTE OF ADVISORY COMMITTEE TO RULE 33: "This rule restates the substance of Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness), with modifications to conform to these rules."

NOTES TO DECISIONS

Evidentiary Matters.

This rule should be liberally construed. Evidentiary, as well as ultimate facts, may be demanded by interrogatories. *Nichols v. Sanborn Co.* (D. C.-Mass.), 24 Fed. Supp. 908; *Dixon v. Sunshine Bus Lines* (D. C.-La.), 27 Fed. Supp. 797; *United States v. American Solvents & Chem. Corp. of California* (D. C.-Del.), 30 Fed. Supp. 107; *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275.

Interrogatories calling for evidence obtained after the action was brought are improper. *McInerney v. McDonald Constr. Co.* (D. C.-N. Y.), 28 Fed. Supp. 557, 42 U. S. P. Q. 65; *Stanley Works v. Mersick & Co.* (D. C.-Conn.), 18 Bull. 43, 1 Fed. R. Dec. 43.

Names of Witnesses.

In an action for damages for breach of warranty in purchase of goods, defendant should be required to answer an interrogatory calling for the name of defendant's representative who engaged in the negotiations leading up to the sale. That such an answer may disclose the name of a witness is no objection. *F. & M. Skirt Co. v. A. Wimpfheimer & Bro.* (D. C.-Mass.), 25 Fed. Supp. 898.

In an action on fire insurance policies, in which the answer alleges arson as a defense, plaintiff's motion for an order directing defendant to supply the names of all persons having knowledge to support the defense, to enable plaintiff to examine the witnesses before trial, should be denied if it appears that to permit such procedure would interfere with impending criminal prosecution of plaintiff on the charge of arson. *Penn v. Automobile Ins. Co.* (D. C.-Ore.), 27 Fed. Supp. 336.

Interrogatories requesting names and addresses of persons having information or knowledge supporting the case of the adverse party are proper. *Penn v. Automobile Ins. Co.* (D. C.-Ore.), 27 Fed. Supp. 336; *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651; *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275; *Whitkop v. Baldwin* (D. C.-Mass.), 29 Bull. 7, 1 Fed. R. Dec. 169.

In an action for trade-mark infringement and unfair competition, defendant's interrogatory requesting the names

of all persons having knowledge of alleged acts of unfair competition is improper unless limited to customers of the defendant. *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275.

A party should not be required by interrogatories to furnish his adversary with the names of witnesses upon whose testimony he intends to rely and thereby limit himself in the introduction of testimony to certain named witnesses, but may be required to furnish names of persons known to him having a specified connection with the controversy. *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275.

Interrogatories may not be propounded concerning the substance of statements made to the defendant by witnesses in the absence of a showing why such information can not be secured from the witnesses by depositions. *Creden v. Central R. Co.* (D. C.-N. Y.), 62 Bull. 29, 1 Fed. R. Dec. 168.

Objections.

In an action for alleged wrongful termination of a lease of an oil station, objections should be sustained to plaintiff's interrogatories asking whether defendant contended that plaintiff was in default, whether defendant considered plaintiff an "independent dealer," and at what price defendant charged plaintiff for gasoline and oil. *Caggiano v. Socony Vacuum Oil Co.* (D. C.-Mass.), 27 Fed. Supp. 240.

In an action by the government to recover taxes for alleged illegal diversion of alcohol, objections to defendant's interrogatories on the ground that answers thereto would disclose the theory of presentation which would be employed to establish knowledge on the part of defendant's officers and agents were overruled. *United States v. American Solvents & Chem. Corp.* (D. C.-Del.), 30 Fed. Supp. 107.

The assertion that interrogatories constitute a "fishing expedition" is not a valid objection thereto. *Boysell Co. v. Hale* (D. C.-Tenn.), 30 Fed. Supp. 255.

The fact that the items called for are or should be within the knowledge of the moving party does not constitute an objection to an interrogatory. *Nakken*

Patents Corp. v. Rabinowitz (D. C.-N. Y.), 58 Bull. 29, 1 Fed. R. Dec. 90.

Patent Suits.

In a patent suit, on plaintiff's objections to defendant's interrogatories for the dates on which the inventions were made, it was held that such dates should be supplied in exchange for a contemporaneous statement by defendant of dates relied on for showing anticipation or prior use. *Babcock & Wilcox Co. v. North Carolina Pulp Co.* (D. C.-Del.), 25 Fed. Supp. 596.

Plaintiff should be required to answer defendant's interrogatories seeking information as to installations by plaintiff said to embody inventions of patents in suit. *Babcock & Wilcox Co. v. North Carolina Pulp Co.* (D. C.-Del.), 25 Fed. Supp. 596.

Plaintiff should not be required in answer to interrogatories to "identify" the respective claims of the patents in suit applicable to his various installations. *Babcock & Wilcox Co. v. North Carolina Pulp Co.* (D. C.-Del.), 25 Fed. Supp. 596.

Plaintiff should be accorded an inspection of the apparatus alleged to infringe, and adequate drawings, before being required to answer interrogatories asking whether drawings submitted show defendant's apparatus and its operation. *Babcock & Wilcox Co. v. North Carolina Pulp Co.* (D. C.-Del.), 25 Fed. Supp. 596.

Plaintiff should not be required to answer interrogatories seeking detailed information about defendant's own acts which is in the possession of the latter. *Babcock & Wilcox Co. v. North Carolina Pulp Co.* (D. C.-Del.), 25 Fed. Supp. 596.

In a patent suit in a District Court, plaintiff is not entitled to answers to interrogatories relating to apparatus alleged to have been manufactured for the United States in view of the fact that the court of claims has sole and exclusive jurisdiction over such claims. *Pierce v. Submarine Signal Co.* (D. C.-Mass.), 25 Fed. Supp. 862.

In a suit to recover for patent infringement, Rule 34 providing for production of documents for inspection should not be applied to permit plaintiff to obtain disclosure of all equipment manufactured by the defendant. Such inquiry is too broad and sweeping. *Pierce v. Submarine Signal Co.* (D. C.-Mass.), 25 Fed. Supp. 862.

It is proper in a patent case to address an interrogatory to plaintiff asking whether a drawing annexed to the interrogatory correctly represents the alleged infringing device, provided defendant stipulates that it represents the device he is actually producing. *Schwartz v. Howard Hosiery Co.* (D. C.-Pa.), 27 Fed. Supp. 443, 41 U. S. P. Q. 141.

Defendant in a patent suit should not be required to answer an interrogatory which calls for a construction of the patent claim and for an admission or denial of infringement as a legal conclusion. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

In a patent suit, interrogatories bearing on damages should not be allowed, since the issue is premature prior to appointment of master to ascertain damages. *O'Rourke v. RKO Radio Pictures* (D. C.-Mass.), 27 Fed. Supp. 996; *Looper v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 255.

In a patent suit in which the answer pleads failure by plaintiff to comply with statutory and other requirements, the plaintiff is entitled to ascertain, by interrogatories, in what respects he is claimed to have failed to comply. *McInerney v. McDonald Constr. Co.* (D. C.-N. Y.), 28 Fed. Supp. 557, 42 U. S. P. Q. 65.

In a patent suit in which the answer pleads that the description in the patent is defective, that the claims are vague or excessive, and the invention is inoperative, the plaintiff is entitled to ascertain by interrogatories the basis for each of these contentions. *McInerney v. McDonald Constr. Co.* (D. C.-N. Y.), 28 Fed. Supp. 557, 42 U. S. P. Q. 65.

In a patent suit, an interrogatory requiring plaintiff to state whether a certain part of the device described in the patent functioned in one of three specified ways is proper. *Lanova Corp. v. National Supply Co.* (D. C.-Pa.), 29 Fed. Supp. 119.

In a patent suit, an interrogatory requiring plaintiff to compare elements of patent claims with defendant's structure is improper as calling for an opinion. *Lanova Corp. v. National Supply Co.* (D. C.-Pa.), 29 Fed. Supp. 119.

In a patent suit, an interrogatory requiring plaintiff to specify what figure of the patent drawings defendant's device most nearly resembles, is improper, since

it calls for an opinion on an immaterial matter. *Lanova Corp. v. National Supply Co.* (D. C.-Pa.), 29 Fed. Supp. 119.

In a patent suit, an interrogatory may be directed to the defendant inquiring when he knew of plaintiff's patent. *Boysell Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122.

In a patent suit, an interrogatory should not be allowed calling on the defendant for an explanation of the differences between his device and that covered by plaintiff's patent, as the discovery should be confined to bare facts. *Boysell Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122.

In a patent suit, an interrogatory may be directed to the defendant inquiring from whom he purchased the infringing articles. *Boysell Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122.

The propriety of interrogatories in a patent suit should be determined under the new rules, even if the action was commenced before the effective date of such rules. *Boysell Co. v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 122.

Interrogatories in a patent suit may call for the names of persons who made parts for defendant's device. *Looper v. Colonial Coverlet Co.* (D. C.-Tenn.), 29 Fed. Supp. 125.

An objection to interrogatories in a patent suit on the ground that they do not seek information in respect to any particular machine or machines is too general since it would require the court to consider particularly each question propounded. *Boysell Co. v. Hale* (D. C.-Tenn.), 30 Fed. Supp. 255.

An interrogatory by plaintiff in a patent suit calling for the furnishing of a model or specimen, conditioned that defendant has answered questions to the effect that its machine does not infringe plaintiff's patent, is improper since it calls for a comparison. *Boysell Co. v. Hale* (D. C.-Tenn.), 30 Fed. Supp. 255.

An objection that the party serving interrogatories in a patent suit is seeking to recover a penalty from the defendant is not valid. *Boysell Co. v. Hale* (D. C.-Tenn.), 30 Fed. Supp. 255.

A party may not properly object to interrogatories in a patent suit on the ground that the party serving them has violated the antitrust laws, since such objection is in the nature of a "speak-

ing" motion. *Boysell Co. v. Hale* (D. C.-Tenn.), 30 Fed. Supp. 255.

In a patent case, interrogatories should be limited to matters concerning those claims of the patents which are in issue. *Stanley Works v. C. S. Mersick & Co.* (D. C.-Conn.), 18 Bull. 43, 1 Fed. R. Dec. 43.

Interrogatories should be limited to matters of fact as distinguished from matters of opinion. *Stanley Works v. C. S. Mersick & Co.* (D. C.-Conn.), 18 Bull. 43, 1 Fed. R. Dec. 43.

That the information sought by interrogatories in a patent suit is contained in patent office trade-mark registrations is not a valid objection to the interrogatories. *Stanley Works v. C. S. Mersick & Co.* (D. C.-Conn.), 48 Bull. 16.

A plaintiff in a patent suit may be required by interrogatories to specify in detail what device or process is charged to infringe the several claims of the patent. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

It is proper to address an interrogatory to a plaintiff in a patent suit as to whether he has used the patented invention on a commercial scale. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

In a patent suit, the plaintiff may be asked by interrogatories to state the meaning of technical expressions used in the patent. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

An interrogatory in a patent suit calling for a statement of the features alleged to be novel in the various claims is improper as calling for an interpretation of the patent. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

The plaintiff in a patent suit may be required by interrogatories to state whether he has offered to assign the patent or to grant licenses thereunder, and, if the answer be in the affirmative, to give the names of any such persons, and, if any such persons acquired licenses, to furnish copies thereof. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

In an action for a declaratory judgment on a patent in which defendant counterclaims for infringement of other patents, defendant's interrogatories concerning plaintiff's processes should be

limited to the period beginning six years prior to the filing of the counterclaim instead of six years prior to the commencement of the action. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

An interrogatory in a patent suit necessitating revelation of secret processes or details of all products made by the party charged with infringement, irrespective of whether such products have any relation to the patent in suit or not, is improper. *E. I. Du Pont De Nemours & Co. v. Byrnes* (D. C.-N. Y.), 58 Bull. 19, 1 Fed. R. Dec. 34.

In a patent suit, the fact that defendant served the statutory notice listing prior art, is not a valid objection to an interrogatory requesting him to state which items of prior art declared will be offered at the trial. *Nakken Patents Corp. v. Rabinowitz* (D. C.-N. Y.), 58 Bull. 29, 1 Fed. R. Dec. 90.

An interrogatory in a patent suit requiring defendant to furnish copies of sketches, drawings, or blue prints which are not in his possession or under his control, is improper. *Nakken Patents Corp. v. Rabinowitz* (D. C.-N. Y.), 58 Bull. 29, 1 Fed. R. Dec. 90.

Interrogatories to defendant in a patent suit must be limited to a period prior to the filing date of the application for the patent in suit. *Nakken Patents Corp. v. Rabinowitz* (D. C.-N. Y.), 58 Bull. 29, 1 Fed. R. Dec. 90.

Personal Injury Suits.

In an action against the manufacturer of dynamite caps for personal injuries from explosion of one of the caps during the process of crimping it, plaintiff alleged negligent manufacture. The Circuit Court of Appeals held that plaintiff need not plead evidence, that "a short and plain statement of the claim showing that the pleader is entitled to relief" is sufficient and that further information if needed can be obtained by interrogatories. *Sierocinski v. E. I. Du Pont De Nemours & Co.* (C. C. A. 3), 103 Fed. (2d) 843.

In a personal injury action, plaintiff may propound interrogatories to defendant dealing with the time of the report to the defendant of the accident and by whom and to whom made, since such information bears upon the bona fides of plaintiff's claim. *Creden v. Central R.*

Co. (D. C.-N. Y.), 62 Bull. 29, 1 Fed. R. Dec. 168.

Interrogatories to defendant in a personal injury action may properly request the names of eye-witnesses to the accident and also the names of witnesses who were present but who did not see the accident. *Creden v. Central R. Co.* (D. C.-N. Y.), 62 Bull. 29, 1 Fed. R. Dec. 168.

In a personal injury action, interrogatories to defendant dealing with similar equipment and accidents are proper. *Creden v. Central R. Co.* (D. C.-N. Y.), 62 Bull. 29, 1 Fed. R. Dec. 168.

In a negligence action, interrogatories by defendant may be directed to details of plaintiff's injuries and other damages. *Graver Tank & Mfg. Corp. v. James B. Derry Sons, Co., Inc.* (D. C.-Pa.), 64 Bull. 53, 1 Fed. R. Dec. 163.

Purpose and Scope in General.

Answers to interrogatories may state the "belief" or "understanding" of the person answering when his answer depends not on his own recollection but upon what others tell him. *F. & M. Skirt Co., Inc. v. A. Wimpfheimer & Bro., Inc.* (D. C.-Mass.), 25 Fed. Supp. 898.

In an action commenced before the effective date of the rules by the issuance of summons under state practice without filing a complaint, plaintiff served interrogatories under this rule subsequently to such date. It is not feasible to apply the rules to an action begun before their effective date in which no complaint has been filed, and the interrogatories should be dismissed. *C. F. Simonins Sons, Inc. v. American Can Co.* (D. C.-Pa.), 26 Fed. Supp. 420.

Interrogatories requiring a party to state his contentions or legal conclusions are improper. *Caggiano v. Socony Vacuum Oil Co.* (D. C.-Mass.), 27 Fed. Supp. 240; *Landry v. O'Hara Vessels, Inc.* (D. C.-Mass.), 29 Fed. Supp. 423.

One of the purposes of this rule is to obtain admissions and thus limit the subjects of controversy at the trial, and avoid unnecessary testimony and waste of time in preparation. *Schwartz v. Howard Hosiery Co.* (D. C.-Pa.), 27 Fed. Supp. 443.

In action for personal injuries and other damages sustained in an automobile accident, defendants were not entitled to have plaintiff examined concerning his contention with respect to the

manner in which the defendant, his agents, servants, and employees operated the vehicle at the time of and immediately prior to the occurrences complained of by the plaintiffs. *Norton v. Cooper-Jarrett* (D. C.-N. Y.), 27 Fed. Supp. 806.

Where action was removed to federal court in May 1938, and was noticed for trial at the term commencing April 4, 1939, defendants were guilty of laches in seeking examination of plaintiffs on April 10, 1939. *Norton v. Cooper-Jarrett* (D. C.-N. Y.), 27 Fed. Supp. 806.

In an action for plagiarism plaintiff is entitled to propound interrogatories as to whether the defendant's agent read the plaintiff's work, which the defendant is charged with copying. *O'Rourke v. RKO Radio Pictures* (D. C.-Mass.), 27 Fed. Supp. 996.

Interrogatories concerning matters admitted by the pleadings should not be allowed. *O'Rourke v. RKO Radio Pictures* (D. C.-Mass.), 27 Fed. Supp. 996.

The scope of discovery by interrogatories is as broad as that by deposition and anything that may be asked on oral examination may also be inquired into by interrogatories. *Landry v. O'Hara Vessels, Inc.* (D. C.-Mass.), 29 Fed. Supp. 423.

Interrogatories by defendant before the filing of an answer should be limited to those which appear relevant solely from an examination of the complaint. *United States v. American Solvents & Chem. Corp. of California* (D. C.-Del.), 30 Fed. Supp. 107; *Graver Tank & Mfg. Corp. v. James B. Derry Sons Co., Inc.* (D. C.-Pa.), 64 Bull. 53, 1 Fed. R. Dec. 163.

Interrogatories should be relatively few in number and related to the important facts of the case, rather than very numerous and concerned with relatively minor evidentiary details. *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275.

In only an exceptional case can more than 15 or 20 interrogatories be conveniently and efficiently submitted. If a more comprehensive examination of the adverse party is desired, it should ordinarily be done by taking his deposition. *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.* (D. C.-Md.), 30 Fed. Supp. 275.

Interrogatories requiring investigation or research, or compilation of statistics, are improper. *Coca Cola Co. v. Dixi-*

Cola Laboratories, Inc. (D. C.-Md.), 30 Fed. Supp. 275.

A litigant's right to discovery through resort to interrogatories is limited only by rules of relevancy. *Dixon v. Phifer* (D. C.-S. Car.), 30 Fed. Supp. 627.

A party should not be delayed in the exercise of his rights under Rule 33 until the trial. *Dixon v. Phifer* (D. C.-S. Car.), 30 Fed. Supp. 627.

An interrogatory which inquires as to what was seen and understood does not call for an opinion in broad sense but for facts disclosed by observation and is proper. *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

Interrogatories calling for opinions are improper. *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903; *Nakken Patents Corp. v. Rabinowitz* (D. C.-N. Y.), 58 Bull. 29, 1 Fed. R. Dec. 90.

Interrogatories to parties are too late if served at the pretrial hearing, except as to some newly-developed situation. *Slydell v. Capital Transit Co.* (D. C.-D. C.), 48 Bull. 15, 1 Fed. R. Dec. 15.

While a party may be compelled by interrogatories to produce an existing photograph, he may not be required to incur the expense of taking a photograph. *Stanley Works v. C. S. Mersick & Co.* (D. C.-Conn.), 48 Bull. 16.

Interrogatories are proper as to any matters relevant to the issue, not admitted by the pleadings and which could be produced in evidence at the trial except matters of self-incrimination, hearsay, or individual exemption or privilege. *Auer v. Hershey Creamery Co.* (D. C.-N. J.), 53 Bull. 52, 1 Fed. R. Dec. 14.

Answers to interrogatories may be ordered without a determination that such answers will be admissible in evidence. If the answers prove to be admissible, having the information in the record will expedite the proceedings. *Sears, Roebuck & Co. v. Harrison* (D. C.-Ill.), 59 Bull. 23, 1 Fed. R. Dec. 135.

Selection of Method for Procuring Information.

In view of Rules 33 and 34 which afford a plaintiff more liberal facilities for discovery than it would have in a suit in equity for discovery, and in view also of the fact that the rules may be invoked in a civil action before com-

mencement, a petition for discovery will be denied. *C. F. Simonins Sons v. American Can Co.* (D. C.-Pa.), 24 Fed. Supp. 765.

Interrogatories to parties under Rule 33 may be used to elicit information broader in scope than that which may be elicited by a motion for a bill of particulars under Rule 12. *American La France-Foamite Corp. v. American Oil Co.* (D. C.-Mass.), 25 Fed. Supp. 386.

A motion for more definite statement and for a bill of particulars should be overruled if the complaint sets forth a cause of action and the information requested can be ascertained by interrogatories under Rule 33, except that if the matters relate to jurisdiction, the motion should be sustained. *Southern Groc. Stores v. Zoller Brew. Co.* (D. C.-Iowa), 26 Fed. Supp. 858.

Information as to matters of evidence which is obtainable on interrogatories may not be secured by a bill of particulars. *Massachusetts Bonding & Ins. Co. v. Harrisburg Trust Co.* (D. C.-Pa.),

27 Fed. Supp. 987; *Adams v. Hendel* (D. C.-Pa.), 28 Fed. Supp. 317; *Laugharn v. Zimmerman* (D. C.-Cal.), 28 Fed. Supp. 348; *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.* (D. C.-Ala.), 28 Fed. Supp. 386; *Ferry-Hallock Co. v. Frost* (D. C.-N. Y.), 29 Fed. Supp. 43.

Interrogatories as to the contents of a communication should not be allowed since adequate means exist for the production of the communication and opportunity to copy it. *O'Rourke v. RKO Radio Pictures* (D. C.-Mass.), 27 Fed. Supp. 996.

Even if a party moving for a bill of particulars states that the information is sought for the purpose of enabling him properly to prepare a responsive pleading and to prepare for trial, the motion should be denied if the information sought is properly the subject of interrogatories and a responsive pleading can be prepared without such information. *Mann v. Cadillac Automobile Co.* (D. C.-Mass.), 29 Fed. Supp. 495.

456. —English Practice.

(Caption.)

Interrogatories on behalf of the above-named plaintiff AB (or defendant CD) for the examination of the above-named defendant EF (or plaintiff GH).

1. Did not, etc.

2. Has not, etc.

Etc., etc.

Attorney for —.

Address.

Source of Form.

Form adapted from English practice (The Annual Practice, 1939, App. B, Pt. II, No. 6).

Cross-Reference.

In connection with Forms 456 to 463, see notes to Form 455.

457. Interrogatories Propounded by Defendant to Plaintiff.

(Caption.)

Interrogatories propounded by defendant and to be answered under oath by —, plaintiff herein (or by president and general manager of plaintiff corporation).

1. State name and address of plaintiff's agent or representative who procured the order for the sale to defendant of the goods referred to in the complaint.

2. Please state the names and addresses of the three employees of plaintiff who accompanied the truck which delivered the goods to defendant's warehouse.

3. Give the date on which manufacture of the goods sold to defendant was completed.

Etc., etc.

Attorney for defendant.

Address.

Date_____.

Note.

The party upon whom interrogatories have been served may within ten days thereafter present objections thereto to the court. The objections must be ac-

companied by notice, as in case of a motion. Otherwise, answers to the interrogatories must be served within 15 days after service of the interrogatories.

458. Motion to Extend Time to Answer Interrogatories.

(Caption.)

Defendant (plaintiff) moves the court for an order extending to _____, 19____, the time to serve answers to interrogatories served upon him by plaintiff (defendant) herein and dated _____, 19____, on the ground that the information requested by plaintiff's (defendant's) interrogatories 3, 4, and 5 is not now in the possession of defendant (plaintiff) and will have to be secured by him from _____, who resides at _____.

Attorney for _____.

Address.

Date_____.

(Annexed Notice of Motion.)

459. Order Extending Time to Answer Interrogatories.

(Caption.)

This cause was heard on defendant's motion for an order extending the time within which to answer interrogatories served upon him by plaintiff herein and dated _____, 19____, and the court being fully advised, it is,

Ordered, that defendant be and he is hereby granted until _____, 19____, inclusive, in which to serve answers to the said interrogatories served upon him by plaintiff herein.

United States district judge.

Date_____.

460. Objections to Interrogatories to a Party.

(Caption.)

Defendant objects to interrogatories served upon him by plaintiff herein as follows:

1. Defendant objects to interrogatories numbered 1, 2, 3, and 4, on the ground that they relate to transactions alleged to have occurred since this action was commenced.
2. Defendant objects to interrogatories numbered 5 and 6, on the ground that they call for an expression of opinion.
3. Defendant objects to interrogatories numbered 7 and 8, on the ground that the information sought thereby is irrelevant to the issues.

Attorney for defendant.

Address.

Date——.

NOTICE

To——
Attorney for plaintiff.

Address.

Please take notice that at —— —. M. on the —— day of ——, 19——, or as soon thereafter as counsel can be heard, defendant will present to this court at —— the annexed objections to interrogatories served upon him by plaintiff herein and dated —— —, 19——.

Attorney for defendant.

Address.

Cross-Reference.

Objection to interrogatories to party,
see also Form 217.

461. Order Overruling Objections to Interrogatories.

(Caption.)

This cause was heard on defendant's objections to interrogatories served upon him by plaintiff herein and dated —— —, 19——, and the court being fully advised, it is ordered that defendant's objections to plaintiff's interrogatories 1 and 3 are hereby overruled and objections to interrogatories 2 and 4 are hereby sustained, and it is further

Ordered, that defendant serve answers to plaintiff's interrogatories, other than interrogatories numbered 2 and 4, on or before — —, 19—.

United States district judge.

Date—.

462. Answers to Interrogatories Served on Plaintiff by Defendant.

(Caption.)

Plaintiff answers interrogatories served herein upon him by defendant on — —, 19—, as follows:

1. In answer to defendant's interrogatory 1, plaintiff states —.
 2. In answer to defendant's interrogatory 2, plaintiff states —.
- Etc., etc.

AB plaintiff.

Address.

Subscribed and sworn to before me this — day of —, 19—.

Notary Public.

463. Answers to Interrogatories to a Party, English Practice.

(Caption.)

To—
Attorney for —.

Address.

Answers of the above-named defendant AB (or plaintiff CD) to the interrogatories for his examination served on him by the above-named plaintiff EF (or defendant GH) on — —, 19—.

In answer to the said interrogatories, I, the above-named defendant AB (or plaintiff CD) make oath and say as follows:

AB defendant.

Address.

Subscribed and sworn to before me this — day of —, 19—.

Official title.

Source of Form.

Form adapted from English practice
(The Annual Practice, 1939, App. B,
Pt. II, No. 7.)

SECTION 3

PRODUCTION OF DOCUMENTS

Form

466. Motion for production of documents under Rule 34.

467. Order requiring production of documents.

Form

468. Order permitting entry upon land for inspecting and photographing.

466. Motion for Production of Documents Under Rule 34.

(Caption.)

Plaintiff A.B. moves the court for an order requiring defendant C.D.

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents and describe each of them.)

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

(Here list the objects and describe each of them.)

(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed: _____,
Attorney for plaintiff.

Address.

(Annex Notice of Motion.)

Exhibit A

State of —,
County of —

A.B., being first duly sworn says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above-mentioned items is relevant to some issue in the action.)

Signed: A.B.

[Jurat]

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 24.

Statutory Reference.

Production of books and writings, 8 F. C. A., Title 28, § 636; U. S. C. A., Title 28, § 636; id. U. S. C.

Federal Rules of Civil Procedure.

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may pre-

scribe such terms and conditions as are just." Rule 34.

NOTE OF ADVISORY COMMITTEE TO RULE 34: "In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 31, r. r. 14, et seq., or for the inspection of tangible property or for entry upon land, O. 50, r. 8. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich. Court Rules Ann. (Searl, 1933) Rule 41, § 2.

"Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, *Discovery Before Trial* (1932), Appendix, p. 267, setting out the statutes.

"Compare Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph)."

NOTES TO DECISIONS**Patent Suits.**

In a suit to recover for patent infringement, this rule should not be applied to permit plaintiff to obtain disclosure of all equipment manufactured by the defendant. Such inquiry is too broad and sweeping. *Pierce v. Submarine Signal Co.* (D. C.-Mass.), 25 Fed. Supp. 862.

In a patent case, plaintiff's motion for inspection of drawings of alleged infringing devices manufactured by the defendant under a military order of secrecy solely for the use of the government was denied as privileged when it appeared that the government opposed such inspection. *Pollen v. Ford Instrument Co.* (D. C.-N. Y.), 26 Fed. Supp. 583, 40 U. S. P. Q. 605.

In a suit for infringement of a patent in which request is made for production of documents relating to commercial operations long before the patent was issued, they are not material and the request will be denied. *Floridin v. Attapulugus Clay Co.* (D. C.-Del.), 26 Fed. Supp. 968, 41 U. S. P. Q. 129.

Requests for production of documents relating to secret processes patented will be denied. *Floridin v. Attapulugus Clay Co.* (D. C.-Del.), 26 Fed. Supp. 968, 41 U. S. P. Q. 129.

During the taking of depositions in a patent suit, the inventor of the defendant's process should be required to respond to questions relating to his interest in such patent after its assignment to defendant. *Floridin Co. v. Attapulugus Clay Co.* (D. C.-Del.), 26 Fed. Supp. 968, 41 U. S. P. Q. 129.

Defendant's motion for permission to inspect and photograph a model should be denied, with leave to renew, in the absence of showing of the existence of the model. *Schoenberg v. Decorative Cabinet Corp.* (D. C.-N. Y.), 27 Fed. Supp. 802.

After defendant in an action for patent infringement has withdrawn his defense of a prior patent, plaintiff may not insist upon the production of the application for such patent. *Floridin Co. v. Attapulugus Clay Co.* (D. C.-Del.), 30 Fed. Supp. 158.

Purpose and Scope in General.

An order of the District Court for the discovery and production of documents for inspection is an interlocutory order and therefore not appealable. *Leader v. Apex Hosiery Co.* (C. C. A. 3), 102 Fed. (2d) 702.

In an action on an "accidental death" clause of a life insurance policy, an

order staying proceedings until plaintiff complied with an order under Rule 34, directing her to consent to exhumation of the body of the deceased, is not a final judgment so as to permit appeal therefrom after expiration of the time limited for appeals from interlocutory orders. *Zalatuka v. Metropolitan Life Ins. Co.* (C. C. A. 7), 108 Fed. (2d) 405.

Parties may pursue only the remedy provided by this rule and Rule 33 in lieu of a bill for discovery. *C. F. Simonin's Sons v. American Can Co.* (D. C.-Pa.), 24 Fed. Supp. 765.

Plaintiff in an action for conspiracy should be required, on defendants' motion for further particulars, to specify whether alleged defamatory statements were oral or in writing, and, if the latter, to attach copies of the writings, since such discovery may be had under Rule 34. *Mulloney v. Federal Reserve Bank* (D. C.-Mass.), 26 Fed. Supp. 148.

A party should not be required to produce correspondence between its unnamed subsidiaries and its adversary. *Piest v. Tide Water Oil Co.* (D. C.-N. Y.), 26 Fed. Supp. 295.

Discovery of documents should not be permitted until answer is filed since until issue is joined it can not be determined whether or not the requested documents contain evidence material to any issue. *Piest v. Tide Water Oil Co.* (D. C.-N. Y.), 26 Fed. Supp. 295.

A party may not be compelled to produce papers not in his own possession. *Orange County Theatres v. Levy* (D. C.-N. Y.), 26 Fed. Supp. 416; *Bough v. Lee* (D. C.-N. Y.), 26 Fed. Supp. 1000; *Flynn v. Cotton* (D. C.-N. Y.), 27 Fed. Supp. 936; *Welty v. Clute* (D. C.-N. Y.), 29 Fed. Supp. 2.

Motion by defendant to compel plaintiff to produce for inspection original documents or papers on which plaintiff's story and musical compositions were written is proper, and authorized by this rule. *Gielow v. Warner Bros. Pictures* (D. C.-N. Y.), 26 Fed. Supp. 425, 40 U. S. P. Q. 537.

The denial of a motion to produce certain documents under an equity rule does not require the denial of a similar motion under this rule, where this rule was not in existence at the time of the original application. *Gielow v. Warner Bros. Pictures* (D. C.-N. Y.), 26 Fed. Supp. 425, 40 U. S. P. Q. 537.

A party seeking a discovery of documents need not prove their materiality, but need only establish that it is reasonably probable that the documents constitute or contain material evidence. *Belser v. Savarona Ship Corp.* (D. C.-N. Y.), 26 Fed. Supp. 599.

Stipulation by the parties requiring the production, and permitting the inspection of, certain books, records, and documents, constitutes a waiver of the requirement of showing reasonable probability of materiality. *Belser v. Savarona Ship Corp.* (D. C.-N. Y.), 26 Fed. Supp. 599.

Permission to enter the land or other property of another for the purpose of inspecting, surveying, or photographing under Rule 34, should be limited in its application to parties to pending actions. *Egan v. Moran Towing & Transp. Co.* (D. C.-N. Y.), 26 Fed. Supp. 621.

It may be observed that a motion under Rule 34 may be addressed only to a party to an action and not to a third person. The rule specifically says the court may order "any party" to produce. Motions addressed to persons other than parties to pending actions were denied in *Egan v. Moran Towing & Transp. Co., Inc.* (D. C.-N. Y.), 26 Fed. Supp. 621, and *Federal Life Ins. Co. v. Holod* (D. C.-Pa.), 29 Fed. Supp. 852.

In respect of the character of documents, the production of which may be required, this rule and Rule 45 (b) must be interpreted as in pari materia. *United States v. Aluminum Co.* (D. C.-N. Y.), 26 Fed. Supp. 711.

Documents produced by defendant in response to a subpoena duces tecum may not be inspected by plaintiff in advance of an inspection and determination by the court that they contain evidence material to the issues. The question of materiality is not to be determined by mere examination of the subpoena. *United States v. Aluminum Co. of America* (D. C.-N. Y.), 26 Fed. Supp. 711.

A motion under Rule 45 (b) to quash a subpoena for the production of documents on the ground that such subpoena is unreasonable and oppressive should be granted in the absence of a showing that the documents called for are material or probably material. The limitations of Rule 34 are equally applicable to subpoenas issued under Rule 45 (b). *United States v. Aluminum Co. of*

America (D. C.-N. Y.), 26 Fed. Supp. 711.

Although a subpoena for the production of documents under Rule 45 may be procured and served on the attorney for a party, he has the right to a determination by the court of the question of privilege. *Bough v. Lee* (D. C.-N. Y.), 26 Fed. Supp. 1000.

Production of government hospital records relating to plaintiff in an action on a war risk insurance contract may be directed and plaintiff may be granted permission to copy them but not to remove them for photographing. *Galanos v. United States* (D. C.-Mass.), 27 Fed. Supp. 298.

In a war risk insurance action, government should not be directed to produce work records of plaintiff while in employ of third parties since the government is no more in control of such records than is plaintiff. *Galanos v. United States* (D. C.-Mass.) 27 Fed. Supp. 298.

Plaintiff in a war risk insurance action is entitled to an order directing the defendant to produce records of government physicians but not those of any other physicians who may have treated plaintiff. *Galanos v. United States* (D. C.-Mass.), 27 Fed. Supp. 298.

Record of deposit in a foreign branch bank could not be obtained by subpoena duces tecum served upon the main office of the bank. *In re Harris* (D. C.-N. Y.), 27 Fed. Supp. 480.

A party may not compel his adversary to produce documents showing whether another person is participating in the defense to a degree that the judgment would be binding against him since this matter is not an issue involved in the action. *Lip Lure v. Bloomingdale Bros.* (D. C.-N. Y.), 27 Fed. Supp. 811.

In an action by a seaman for personal injuries, defendant shipowner was ordered to allow plaintiff to inspect and copy any reports made in the regular course of business with reference to plaintiff's injuries. Plaintiff should be permitted to inspect the log book, failing which, the motion to strike portions of the answer for failing to comply with the order should be granted. *Murphy v. New York & Porto Rico S. S. Co.* (D. C.-N. Y.), 27 Fed. Supp. 878.

Production of records and articles for inspection should, technically, be sought under Rule 34 but if such discovery has been attempted by a motion for a bill

of particulars no useful purpose is served by denying it. *Teller v. Montgomery Ward & Co.* (D. C.-Pa.), 27 Fed. Supp. 938, 41 U. S. P. Q. 651.

Interrogatories as to the contents of a communication should not be allowed since adequate means exist for the production of the communication and opportunity to copy it. *O'Rourke v. RKO Radio Pictures* (D. C.-Mass.), 27 Fed. Supp. 996.

A party is entitled to the production of documents which appear to be material to issues, even though he states that he seeks them for the purpose of enabling him to amend his pleading. *United States v. Doudera* (D. C.-N. Y.), 28 Fed. Supp. 223.

On motion for production of documents, counsel for opposing party may be directed to obtain the documents from his client and make them available for copying or photographing by the moving party. *Monks v. Hurley* (D. C.-Mass.), 28 Fed. Supp. 600.

The following cases hold that the production of documents of the type referred to in the instant case may be required at the taking of depositions. *Bough v. Lee* (D. C.-N. Y.), 28 Fed. Supp. 673; *Kulich v. Murray* (D. C.-N. Y.), 28 Fed. Supp. 675.

The production of only such documents may be ordered as are in the possession or control of the party against whom the order is sought and may not include documents that are "known to" such party. *Bough v. Lee* (D. C.-N. Y.), 29 Fed. Supp. 498; *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

In an action for negligence, statements made by plaintiff's fellow employees after the event as to the details of the accident are not evidence but are merely memoranda for use at the trial and, therefore, are not subject to production. The court expressly refers to decisions to the contrary in the same and adjoining districts, but declines to follow them. *Kenealy v. Texas Co.* (D. C.-N. Y.), 29 Fed. Supp. 502.

Production of all photographs made prior to institution of an action for negligence is too broad and should be limited to photographs of the site of the accident. *Kenealy v. Texas Co.* (D. C.-N. Y.), 29 Fed. Supp. 502.

Production of documents should not be ordered in the absence of a showing of some adequate reason for the desired production and inspection. *Kenealy v. Texas Co.* (D. C.-N. Y.), 29 Fed. Supp. 502; *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903; *Sonken-Galamba Corp. v. Atchison, T. & Santa Fe R. Co.* (D. C.-Mo.), 30 Fed. Supp. 936.

The rule does not permit a roving inspection of a promiscuous mass of documents but is limited to an inspection of those documents designated sufficiently to permit their identification with some reasonable degree of particularity. *Kenealy v. Texas Co.* (D. C.-N. Y.), 29 Fed. Supp. 502; *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903; *Sonken-Galamba Corp. v. Atchison, T. & Santa Fe R. Co.* (D. C.-Mo.), 30 Fed. Supp. 936; *Radtke Patents Corp. v. Rabinowitz* (D. C.-N. Y.), 60 Bull. 12, 1 Fed. R. Dec. 126.

In an action for personal injuries aboard ship, the production of "statements of the captain or any other officer aboard the vessel as to the accident" should not be required since such statements are not evidence. *Fluxgold v. United States Lines Co.* (D. C.-N. Y.), 29 Fed. Supp. 506.

In an employee's action for personal injuries, defendant employer should not be required to produce "All statements made by witnesses and any and all persons to the insurance company as to the manner of the happening of the accident," since such statements are not evidence. *Bennett v. Waterman Steamship Corp.* (D. C.-N. Y.), 29 Fed. Supp. 506.

Documents produced for inspection become admissible on behalf of the producing party even if the demanding party refuses to place them in evidence, although the state rule may be to the contrary. *McCarthy v. Palmer* (D. C.-N. Y.), 29 Fed. Supp. 585.

A party should not be permitted to examine affidavits and similar materials secured by another party by independent investigation incident to the preparation of the latter's case for trial, except in the most unusual circumstances. *McCarthy v. Palmer* (D. C.-N. Y.), 29 Fed. Supp. 585.

Plaintiff in an action for personal injuries sustained in an automobile acci-

dent was denied production of employment record of the driver of defendant's vehicle and also maintenance and repair records of the vehicle for a period of six months prior to the accident, such records for one month prior to the accident being regarded as sufficient, it appearing that the maintenance, operation, and control of the vehicle were admitted by defendant. *Fletcher v. Foremost Dairies, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 744.

Certain portions of World War Draft records are not subject to production, as the Selective Service Regulations place them beyond the process of the courts. *Federal Life Ins. Co. v. Holod* (D. C.-Pa.), 29 Fed. Supp. 852.

Social security records, unemployment compensation records and income tax records may be the subject of an order of discovery and production. *Fidelity & Casualty Co., Inc. v. Tar Asphalt Trucking Co., Inc.* (D. C.-N. J.), 30 Fed. Supp. 216.

An order directing production of documents may reserve the question of materiality and privilege as to whether inspection should be permitted until they are submitted to the court. *Bruun v. Hanson* (D. C.-Idaho), 30 Fed. Supp. 602.

Production of documents may be ordered even if they relate to information already supplied by a bill of particulars. *Bruun v. Hanson* (D. C.-Idaho), 30 Fed. Supp. 602.

World War Draft records are privileged and consequently not subject to production. *Federal Life Ins. Co. v. Holod* (D. C.-Pa.), 30 Fed. Supp. 713.

A motion for the production of documents must designate the papers sought sufficiently to advise the party as to what is required and to enable the court to determine their admissibility. The words "any and all" are not sufficiently descriptive for that purpose. *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

Party should not be subjected to excessive labor and expense in producing numerous documents covering a period of years. *Sonken-Galamba Corp. v. Atchison, T. & Santa Fe R. Co.* (D. C.-Mo.), 30 Fed. Supp. 936.

In an action against the collector of internal revenue for refund of taxes, in which the contention is that part of the inventory was overvalued and part undervalued, defendant's motion for in-

spection of plaintiff's records relating to the entire inventory should be granted. *Pacific Mills v. Nichols* (D. C.-Mass.), 31 Fed. Supp. 43.

In an action for personal injuries against the liability insurance carrier of plaintiff's employer, plaintiff's motion for production of the contract of insurance was overruled as being too late, it appearing that it was filed 18 months after the answer which denied the existence of such a contract. *Wood v. Morrissey* (D. C.-La.), 31 Fed. Supp. 449.

In a proceeding by the government for the condemnation of land, defendants' motion for an order for discovery and for the production by the government of documents under Rule 34 was denied on the ground that by virtue of this rule the rules are not applicable to condemnation proceedings, except on appeal. *United States v. Certain Lands* (D. C.-Ill.), 12 Bull. 28.

The order directing production of documents should specify the time, place,

and manner of making inspection and copies thereof. *Rosenblum v. Dingfelder* (D. C.-N. Y.), 32 Bull. 30, 1 Fed. R. Dec. 179.

Production of documents which are not admissible in evidence, except possibly as a means of contradicting a witness at the trial, should be denied. *Slydell v. Capital Transit Co.* (D. C.-D. C.), 48 Bull. 18, 1 Fed. R. Dec. 15.

A motion for the production of documents is too late if made at the pretrial hearing. *Slydell v. Capital Transit Co.* (D. C.-D. C.), 48 Bull. 18, 1 Fed. R. Dec. 15.

In the absence of a showing of good cause, a party should not be required to produce statements of witnesses obtained by him in preparation for trial other than such statements signed by the moving party himself. *Seals v. Capital Transit Co.* (D. C.-D. C.), 59 Bull. 24, 1 Fed. R. Dec. 133.

467. Order Requiring Production of Documents.

(Caption.)

This cause was heard on plaintiff's motion to require defendant to produce documents, and the court being fully advised, it is,

Ordered, that defendant be and he is hereby directed to permit —, plaintiff, or his attorney or agent, to inspect and make copies of the following documents:

1. —.
2. —.
3. —.

at the office of —, at —, during office hours, beginning — —, 19—.

United States district judge.

Date—.

Cross-Reference.

In connection with Forms 467 and 468, see notes to Form 466.

468. Order Permitting Entry upon Land for Inspecting and Photographing.

(Caption.)

This cause was heard on motion of plaintiff for an order requiring defendant CD to permit plaintiff to enter [here describe property to be

entered] and to inspect and photograph [here describe the portion of the real property and the objects to be inspected and photographed], and the court being fully advised, it is

Ordered, that defendant be and he is hereby directed to permit plaintiff, his attorney or agent, to enter [here describe property to be entered] and to inspect and photograph [here describe portion of the real property and objects to be inspected and photographed], and it is further

Ordered, that defendant shall permit such entry for the purpose of inspection and photographing during business hours on ———, 19——, and [here insert any other desired terms and conditions].

United States district judge.

Date——.

SECTION 4

PHYSICAL EXAMINATIONS

Form

471. Motion for physical examination of party.

472. Order for physical examination.

Form

473. Motion for delivery of report of physical examination.

474. Order for delivery of report of physical examination.

471. Motion for Physical Examination of Party.

(Caption.)

Defendant moves the court for an order to require plaintiff to submit to a physical examination by a physician on the ground that this is an action for damages for personal injuries alleged to have been sustained by plaintiff as a result of defendant's negligence, and that defendant has no knowledge of the true nature and extent of plaintiff's injuries, if any, and has no means of ascertaining them except by a physical examination of plaintiff by a competent physician.

Attorney for defendant.

Address.

Date——.

(Annex Notice of Motion.)

Federal Rules of Civil Procedure.

"In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only

on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Rule 35 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 35: "Physical examination of parties before trial is authorized by statute or rule in a number of states. See *Ariz. Rev. Code Ann.* (Struckmeyer, 1928) § 4468; *Mich. Court Rules Ann.* (Searl, 1933) Rule 41, § 2; 2 *N. J. Comp. Stat.* (1910) Evidence, § 19, p. 2226; *N. Y. C. P. A.* (1937) 306; 1 *S. D. Comp. Laws* (1929) 2716A; 3 *Wash. Rev. Stat. Ann.* (Remington, 1932) § 1230-1.

"Mental examination of parties is authorized in Iowa. *Iowa Code* (1935) ch. 491-F1. See McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in Iowa*, 20 *Ia. L. Rev.* 68 (1934).

"The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon v. Man-*

hattan Railway Co., 142 *N. Y.* 298, 37 *N. E.* 113 (1894), and *McGovern v. Hope*, 63 *N. J. L.* 76, 42 *Atl.* 830 (1899). In *Union Pacific Ry. Co. v. Botsford*, 141 *U. S.* 250 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co. v. Stetson*, 177 *U. S.* 172 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, c. 651, *U. S. C.*, Title 28, §§ 723b (Rules in actions at law; Supreme Court authorized to make) and 723c (Union of equity and action at law rules; power of Supreme Court)."

NOTES TO DECISIONS

Order for Examination [Rule 35 (a)].

An order for a physical examination is interlocutory and not appealable. *Bowles v. Commercial Casualty Ins. Co.* (C. C. A. 4), 107 *Fed.* (2d) 169.

Rule 35 (a), authorizing the courts to order a party to submit to a physical examination, is valid, since it is a rule of procedure, and not of substantive law. *Sibbach v. Wilson & Co., Inc.* (C. C. A. 7), 108 *Fed.* (2d) 415.

A physical examination of plaintiff in a personal injury case may be ordered on condition that it be taken at a time and place convenient to plaintiff. *Sibbach v. Wilson & Co., Inc.* (C. C. A. 7), 108 *Fed.* (2d) 415; *Randolph v. McCoy*

(D. C.-Tex.), 29 *Fed. Supp.* 978; *Strasser v. Prudential Ins. Co.* (D. C.-Ky.), 40 *Bull.* 37, 1 *Fed. R. Dec.* 125.

A motion for an order to require plaintiff to submit to a physical and mental examination should be overruled in an action for libel stating that plaintiff was suffering from various physical and mental conditions. *Wadlow v. Humbert* (D. C.-Mo.), 27 *Fed. Supp.* 210.

As selection of the physician to conduct a physical examination of a party rests within the sound discretion of the court, objections by party who is to be examined to the appointment of his adversary's choice should be sustained. *Italia* (D. C.-N. Y.), 27 *Fed. Supp.* 785.

472. Order for Physical Examination.

(Caption.)

This cause was heard on motion of defendant to require plaintiff to submit to a physical examination, and the court being fully advised it is

Ordered, that plaintiff be and he is hereby directed to present himself at the office of Dr. —, at —, on the — day of —, 19—, at — M., and there submit to a physical examination by Dr. —. Plaintiff may be accompanied by his attorney and any licensed physician of his selection who may also be present during the examination.

United States district judge.

Date—.

Cross-Reference.

See notes to Form 471.

473. Motion for Delivery of Report of Physical Examination.

(Caption.)

Defendant moves the court for an order directing plaintiff to deliver to defendant a copy of the report of the physical examination of plaintiff by Dr. —, on the ground that defendant delivered to plaintiff a copy of the report of Dr. —'s examination of plaintiff conducted pursuant to order dated — —, 19—, and plaintiff has refused to deliver to defendant a copy of a like report of an examination conducted by Dr. —.

Attorney for defendant.

Address.

Date—.

Cross-Reference.

Advisory notes to Rule 35, see Form 471.

Federal Rules of Civil Procedure.

"(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the

examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial." Rule 35 (b) (1).

NOTES TO DECISIONS

Report of Findings [Rule 25 (b)].

The fact that a party to an action submits to a medical examination on behalf of his adversary without an order

of the court does not deprive him of his right to a copy of the report of such examination. *Kelleher v. Cohoes Trucking Co.* (D. C.-N. Y.), 25 Fed. Supp. 965.

474. Order for Delivery of Report of Physical Examination.

(Caption.)

This cause was heard on defendant's motion to require plaintiff to deliver to defendant a copy of the report of a physical examination of plaintiff conducted by Dr. —, and the court being fully advised, it is

Ordered, that plaintiff be and he is hereby directed to deliver to defendant or his attorney, on or before — —, 19—, a copy of the report of the physical examination of plaintiff conducted by Dr. —.

United States district judge.

Date—.

Cross-Reference.

See notes to Forms 471, 473.

SECTION 5

REQUESTS FOR ADMISSIONS

Form

477. Request for admission under Rule 36.
 478. Request for admission of facts, English practice.
 479. Request for admission of genuineness of documents.
 480. Request for admission of facts, insurance case.

Form

481. Notice of motion for extension of time within which to respond to request for admission of facts.
 482. Order extending time within which to deny matters contained in request for admission.
 483. Reply to request for admission of facts.

477. Request for Admission Under Rule 36.

(Caption.)

Plaintiff A.B. requests defendant C.D. to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: _____,
 Attorney for Plaintiff.

Address: _____.

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 25.

Federal Rules of Civil Procedure.

"At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom

the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters." (Rule 36 (a).)

NOTE OF ADVISORY COMMITTEE TO RULE 36: "Compare similar rules: Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 32; Ill. Rev. Stat. (1937) ch. 110, § 182 and Rule 18 (Ill. Rev. Stat. (1937) ch. 110, § 259.18); 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 69; Mich. Court Rules Ann. (Searl, 1933) Rule 42; N. J. Comp. Stat. (2 Cum. Supp. 1911-1924) ch. 163, § 294; N. Y. C. P. A. (1937) §§ 322, 323; Wis. Stat. (1935), § 327.22."

NOTES TO DECISIONS

Request for Admission [Rule 36 (a)].

The word "therein" in the first sentence of par. (a) refers to matters of fact relevant to the pleadings and contained in the request for admissions and does not refer merely to matters of fact set forth in a document concerning which an admission of genuineness is requested. *Walsh v. Connecticut Mut. Life Ins. Co.* (D. C.-N. Y.), 26 Fed. Supp. 566.

Summary judgment may be granted if the facts which stand admitted by reason of a party's failure to deny statements contained in a request for admissions show that no material issue of fact exists. See Rule 56. *Walsh v. Connecticut Mut. Life Ins. Co.* (D. C.-N. Y.), 26 Fed. Supp. 566.

A party served with a request for admissions of fact is deemed to have admitted all relevant facts if he does not within the time allowed by the rules specifically deny them or set forth reasons why he can not truthfully admit or deny them. *Walsh v. Connecticut Mut. Life Ins. Co.* (D. C.-N. Y.), 26 Fed. Supp. 566; *McCrane v. Morgan Packing Co.* (D. C.-Ohio), 26 Fed. Supp. 812.

Requests for admission of facts are proper in respect to matters as to which the party to whom the request is directed does not have personal knowledge, if he can secure the information. *Booth Fisheries Corp. v. General Foods Corp.* (D. C.-Del.), 27 Fed. Supp. 268; *Hamauer ex rel. Wogahn v. Siegel* (D. C.-Ill.), 29 Fed. Supp. 329; *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

A party may be required to admit or deny the genuineness and the receipt by him of a specified letter and accompanying report but not the truth of all facts contained therein without specific designation of the particular relevant facts which the moving party seeks to have admitted. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

A notice requesting the admission of facts and genuineness of documents need not designate the time within which the admissions or denials shall be made, since the rule expressly fixes such time at 10 days. *Kraus v. General Motors Corp.* (D. C.-N. Y.), 27 Fed. Supp. 537.

The court may not entertain a motion to vacate, modify, or limit a request for admission of facts and genuineness of documents. *Nakrasoff v. United States Rubber Co.* (D. C.-N. Y.), 27 Fed. Supp. 953.

A party may simultaneously examine his adversary before trial and require him to respond to a request for admission concerning the same matters. *Nakrasoff v. United States Rubber Co.* (D. C.-N. Y.), 27 Fed. Supp. 953.

Before the Federal Rules of Civil Procedure were made applicable to proceedings in copyright, this rule did not apply to copyright actions. *Borden v. General Motors Corp.* (D. C.-N. Y.), 28 Fed. Supp. 330.

Requests for admission of facts are proper in respect to facts within knowledge of requesting party. *Hamauer ex rel. Wogahn v. Siegel* (D. C.-Ill.), 29 Fed. Supp. 329.

Rule 36 was intended to operate extra-judicially, that is, without burdening the court with applications for relief from improper requests. *Modern Food Process Co., Inc. v. Chester Packing & Provision Co., Inc.* (D. C.-Pa.), 30 Fed. Supp. 520.

A party served with requests for admissions may respond by stating that he has no knowledge or that the other party has no right to request the admissions in question. *Modern Food Process Co., Inc. v. Chester Packing & Provision Co., Inc.* (D. C.-Pa.), 30 Fed. Supp. 520.

If an improper request for admission is served, such as one directed to irrelevant private matters or one which violates constitutional rights, the responding party may properly state that he can not truthfully either admit or deny it and his refusal to answer accompanied by a statement of legal objection would be sufficient to prevent summary judgment. *Modern Food Process Co., Inc. v. Chester Packing & Provision Co., Inc.* (D. C.-Pa.), 30 Fed. Supp. 520.

Requests for admissions under Rule 36 are not subject to a motion to strike. *Modern Food Process Co., Inc. v. Chester Packing & Provision Co., Inc.* (D. C.-Pa.), 30 Fed. Supp. 520; *Van Horne v. Hines* (D. C.-D. C.), 31 Fed. Supp. 346; *Unlandherm v. Park Contracting Corp.* (D. C.-N. Y.), 61 Bull. 31, 1 Fed. R. Dec. 122; *Securities & Exch. Comm. v.*

Payne (D. C.-N. Y.), 61 Bull. 32, 1 Fed. R. Dec. 118.

In an action for patent infringement, plaintiff may properly be requested to admit the dates of publication of prior art references cited by defendant in his answer. *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

A request for admission of facts is not invalidated by failure to designate therein a time limit within which reply should be made. *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

A motion to dismiss does not lie to test the sufficiency of a request for admission of facts, since if the party is unable to reply to the request, he may file a sworn statement to that effect. *Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 903.

If the United States or one of its officers or agencies is a party to an action, a statement on its behalf in response to a request for admission may be sworn to by an assistant United States attorney. *Van Horne v. Hines* (D. C.-D. C.), 31 Fed. Supp. 346.

The statement denying the truth of matters of which an admission is requested need not be sworn to by the party to whom the request is directed but may be sworn to by his attorney, or by any other person who can do so on knowledge or on information and be-

lief. *Van Horne v. Hines* (D. C.-D. C.), 31 Fed. Supp. 346.

The court may determine whether the sworn statement in response to a request for admission relieves the adverse party of the necessity of proof of the matters contained in the request. *Van Horne v. Hines* (D. C.-D. C.), 31 Fed. Supp. 346.

The response to a request for admissions need not set out the evidence in support of the statement nor include the names of witnesses to be called. *Van Horne v. Hines* (D. C.-D. C.), 31 Fed. Supp. 346.

The request for admissions and the statement in response are not part of the pleadings, but relate to the proof. *Van Horne v. Hines* (D. C.-D. C.), 31 Fed. Supp. 346.

A party need not comply with a request under this rule which seeks to obtain an admission as to evidence which it is claimed certain persons would give if called as witnesses. *Treasure Imports v. Henry Amdur & Sons* (D. C.-N. Y.), 18 Bull. 51.

Requests for admissions may relate to statements of facts contained in the request and need not be limited to statements in documents attached to a request. *Unlandherm v. Park Contracting Corp.* (D. C.-N. Y.), 61 Bull. 31, 1 Fed. R. Dec. 122; *Securities & Exch. Comm. v. Payne* (D. C.-N. Y.), 61 Bull. 32, 1 Fed. R. Dec. 118.

478. Request for Admission of Facts, English Practice.

(Caption.)

To _____

Attorney for ____.

Address.

Please take notice that the plaintiff (defendant) in this action requests the defendant (plaintiff) to admit, for the purposes of this action only, the following facts, subject to all legal objections to the admissibility of such facts as evidence in this action:

1. That John Doe died on ____ —, 19__.
2. That he died intestate.
3. That James Doe was his only lawful son.

4. That Julius Doe died on ———, 18—.
5. That Julius Doe never was married.

Attorney for ———.

Address.

Date——.

Source of Form.

Form adapted from English practice
(The Annual Practice, 1939, App. B,
Pt. II, No. 12).

Cross-Reference.

In connection with Forms 478 to 483,
see notes to Form 477.

479. Request for Admission of Genuineness of Documents.

(Caption.)

To———

Attorney for ———.

Address.

Please take notice that the plaintiff (defendant) in this action proposes to adduce in evidence the several documents hereunder specified, copies of which are hereto annexed; and the defendant (plaintiff) is hereby requested to admit the genuineness of the originals of said copies, that said originals were respectively written, signed, or executed, as they are purported respectively to have been, and that such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, subject to all legal objections to the admissibility of all such documents as evidence in this action.

1. Deed from AB and CD to EF, dated ———, 18—.
2. Letter, defendant to plaintiff, dated ———, 19—.
3. Policy of insurance issued by ——— Co. on the life of AB, dated ———, 19—.
4. Promissory note for ——— dollars (\$——), executed by AB, payable in ——— days to order of CD, and dated ———, 19—.
5. Record of a judgment of the ——— Court of ———, in an action AB v. CD, dated ———, 19—.
6. Letter, plaintiff to defendant, dated ———, 19—, and sent by mail ———, 19—.
7. Certificate of birth of AB, dated ———, 19—.
8. Memorandum of agreement between plaintiff and defendant dated ———, 19—.

9. Notice to take deposition of AB as a witness herein, dated ———, 19—, and served on defendant on ———, 19—.

10. Lease of Blackacre to AB by CD dated ———, 19—.

Attorney for ———.

Address.

Date——.

Source of Form.

Form adapted from the English practice (The Annual Practice, 1939, App. B, Pt. II, No. 11).

480. Request for Admission of Facts, Insurance Case.

(Caption.)

To——
Attorney for plaintiff.

Address.

The defendant, The —— Life Insurance Company, requests the plaintiff, MW, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility, which may be interposed at the trial:

That each of the following statements is true:

1a. In ——, 19—, SW (plaintiff's deceased husband) sustained a personal injury, to wit: a fracture of his jaw.

1b. Said fracture was on the right side of the lower jaw.

1c. Said SW consulted Dr. D of ——, in ——, 19—.

1d. Said SW consulted said Dr. D in ——, 19—, for said fracture of the jaw.

1e. Exhibit A, annexed hereto, is a correct copy of said Dr. D's record of his treatments of said SW in —— and ——, 19—.

1f. The facts stated in Exhibit A, annexed hereto, are correct.

1g. In or about ——, 19—, or thereafter, said SW informed the plaintiff that he had received an injury to his jaw.

1h. Said SW informed the plaintiff that such injury was a fracture of his jaw.

1i. Said SW informed the plaintiff that he sustained said injury to his jaw by being struck by a person's fist.

1j. Said SW informed the plaintiff that he sustained said injury to his jaw while he was intoxicated by the use of alcoholic stimulants.

1k. Said SW informed the plaintiff that he sustained said injury while engaged in a fight or brawl.

1l. Said SW informed the plaintiff that he had been treated by Dr. D for said injury.

2a. In —, 19—, said SW sustained a personal injury, to wit: an acute bursitis of an elbow.

2b. Said injury was to the left elbow.

2c. Said SW consulted Dr. T, a physician, of —, —, in —, 19—.

2d. Said SW was treated by Dr. T in —, 19—, for said bursitis of said elbow.

2e. In or about —, 19—, or thereafter, said SW informed the plaintiff that he had received an injury to his elbow.

2f. Said SW informed the plaintiff that he had been treated by said Dr. T for such injury.

3a. In —, 19—, said SW had a personal injury, to wit: a transverse lacerated wound of the left side of his face below the eye, with contusions of the face and eye.

3b. Said SW consulted Dr. R and Dr. T, physicians of —, —, in —, 19—.

3c. Said SW was treated by said Dr. R and Dr. T in —, 19—, for said injuries to his face and eye.

3d. Said SW informed the plaintiff that said injuries were sustained while he was intoxicated by the use of alcoholic stimulants.

3e. Said SW informed the plaintiff that he sustained said injuries in a fight or brawl.

3f. Said Dr. R treated said SW in —, 19—, when said SW was intoxicated by the use of alcoholic stimulants.

3g. Said SW was so intoxicated by the use of alcoholic stimulants when treated by said Dr. R in —, 19—, that said SW fought with said Dr. R.

3h. Said SW was so intoxicated by the use of alcoholic stimulants that he was struggling with plaintiff when said Dr. R arrived on that occasion.

3i. Said SW used abusive language to plaintiff and to said Dr. R on that occasion, due to said SW's being intoxicated by the use of alcoholic stimulants.

4a. Said SW had used beer, wine, or other alcoholic stimulants to excess prior to —, 19—.

4b. He had done so on many occasions.

4c. He had done so for many years.

5a. Prior to —, 19—, said SW had been treated by physicians for the excessive use of alcoholic stimulants.

5b. Said SW had become a chronic alcoholic prior to —, 19—.

6a. One of the causes of the death of SW was alcoholism.

6b. One of the causes of the death of SW was acute alcoholic poisoning.

6c. One of the causes of the death of SW was chronic alcoholic poisoning.

6d. One of the causes of the death of SW was delirium tremens.

6e. One of the causes of the death of SW was pneumonia.

7. The death of SW resulted, directly or indirectly, from various causes, including:

(a) Alcoholism.

(b) Acute alcoholic poisoning.

- (c) Chronic alcoholic poisoning.
- (d) Delirium tremens.
- (e) Pneumonia.

8. On ———, 19—, the following persons were guests at the home of SW:

- (a) A man and his wife (hereinafter referred to as Mr. and Mrs. H).
- (b) Mr. H's father.
- (c) Mrs. H's mother.

The language used in requests 9 and 10 is very obscene and offensive and for these reasons is omitted.

11. Language mentioned in paragraphs 9 and 10:

- (a) Was unjustified.
- (b) Did not correctly describe the character of the persons referred to.
- (c) Was offensive.
- (d) Was disorderly.
- (e) Was abusive.
- (f) Was insulting.

12. SW used said language mentioned in paragraphs 9 and 10 in the presence of:

- (a) Mr. H.
- (b) Mrs. H.
- (c) Mr. H's father.
- (d) Mrs. H's mother.
- (e) Mrs. W, the plaintiff.

13. After SW had used such language, Mr. H struck SW on the jaw.

Attorney for defendant.

Date——.

Address.

Source of Form.

Walsh v. Connecticut Mutual Life Ins.
Co. (D. C.-N. Y.), 26 Fed. Supp. 566.

**481. Notice of Motion for Extension of Time within Which to Respond
to Request for Admission of Facts.**

(Caption.)

To———

Attorney for ——.

Address.

Please take notice that on ———, 19—, at ——. M., or as soon thereafter as counsel can be heard, plaintiff herein will move this court at ———, for an extension of time within which to reply to defendant's request for

admission of facts served and dated — —, 19—. The grounds for said motion are —.

Attorney for —.

Date—.

Address.

482. Order Extending Time within Which to Deny Matters Contained in Request for Admission.

(Caption.)

This cause was heard on plaintiff's motion for an extension of time within which to reply to the request for admission served upon him by defendant herein, and the court being fully advised, it is

Ordered, that plaintiff be and he is hereby granted until and including — —, 19—, within which to reply to the request for admission of facts served on him by defendant on — —, 19—.

Date—.

United States district judge.

483. Reply to Request for Admission of Facts.

(Caption.)

To—
Attorney for defendant.

Address.

STATE OF —, }
COUNTY OF —. } ss:

Plaintiff makes reply to defendant's request for admission served herein and dated — —, 19—, as follows:

1. He denies the truth of the matter set forth in paragraph one.
2. He denies the truth of the matter set forth in paragraph two.
5. He denies the truth of the matter set forth in paragraph five.
9. He states that he can not truthfully either admit or deny the matter set forth in paragraph nine, for the reason that — [for the following reasons —].

Date—.

AB, plaintiff.

Subscribed and sworn to before me this — day of —, 19—.

Notary public.

Note.

No reply is made to those paragraphs the truth of which the party making reply desires to admit.

SECTION 6

ENFORCEMENT OF DISCOVERY

Form

486. Notice of motion to compel answer to questions propounded upon oral examination.
487. Order compelling answer to questions propounded upon oral examination.
488. Notice of motion to compel answer to interrogatory.
489. Order compelling answers to interrogatories.
490. Order denying motion to compel answers to interrogatories and requiring examining party to pay expenses to refusing party.
491. Notice of motion to establish facts for failure to comply with order requiring answers to questions.
492. Order establishing facts for failure to obey order requiring answers to interrogatories.
493. Notice of motion to prohibit introduction of evidence for failure to obey order requiring production of documents.

Form

494. Notice of motion to dismiss the action for failure to obey order requiring submission to physical examination.
495. Notice of motion for arrest of party for failure to obey order directing him to answer questions.
496. Notice of motion to require payment of expenses of proof for refusal to admit.
497. Order for payment of expenses of proof for refusal to admit.
498. Order denying motion for payment of expenses of proof for refusal to admit.
499. Notice of motion for judgment by default for failure of party to attend taking of his deposition or to serve answers to interrogatories.
500. Order directing entry of judgment by default for failure of party to attend taking of his deposition or to serve answers to interrogatories.

486. Notice of Motion to Compel Answer to Questions Propounded upon Oral Examination.

(Caption.)

To _____

Attorney for ____.

Address.

Please take notice that plaintiff (defendant) will move this court, at _____, at _____ M., on _____, 19____, or as soon thereafter as counsel can be heard, for an order compelling defendant (plaintiff) (John Doe, as a witness herein on behalf of the defendant (plaintiff)) to answer the following questions which he refused to answer at the taking of his deposition upon oral examination before _____, at _____, on _____, 19____:

1. _____.
2. _____.
3. _____.

Attorney for ____.

Date _____.

Address.

Cross-Reference.

See notes to Form 491.

Statutory Reference.

Judgment for failure to produce books and writings, 8 F. C. A., Title 28, § 636; U. S. C. A., Title 28, § 636; *id.*, U. S. C.

Federal Rules of Civil Procedure.

"If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising

ing the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees." Rule 37 (a).

"If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." Rule 37 (d).

"A subpoena may be issued as provided in the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U. S. C., Title 28, § 711, under the circumstances and conditions therein stated." Rule 37 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 37: "The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 212 U. S. 322 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 167 U. S. 409 (1897), for the mere purpose of punishing for contempt."

NOTES TO DECISIONS**Failure of Party to Attend or Serve Answers [Rule 37 (d)].**

The remedy provided for wilful failure to appear after being served with notice to take depositions applies only to parties or officers or managing agents of

parties and not to other persons. *Freeman v. Hotel Waldorf-Astoria Corp.* (D. C.-N. Y.), 27 Fed. Supp. 303; *Cohn v. Annunziata* (D. C.-N. Y.), 27 Fed. Supp. 805.

487. Order Compelling Answer to Questions Propounded upon Oral Examination.

(Caption.)

This cause was heard on motion of plaintiff (defendant) for an order compelling defendant (plaintiff) (John Doe, witness herein on behalf of the defendant (plaintiff)) to answer questions propounded to him upon oral examination, and the court being fully advised in the premises, it is

Ordered that defendant (plaintiff) (John Doe as witness herein on behalf of the defendant (plaintiff)) be and he is hereby directed to answer the following questions propounded to him upon his oral examination before —, at —, on — —, 19—, which he refused to answer on said occasion:

1. _____.
2. _____.
3. _____.

Date—.

United States district judge.

Note.

If the court finds that the refusal to answer was without substantial justification, the order may also direct the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party

the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

Cross-Reference.

In connection with Forms 487 to 491, see notes to Form 486.

488. Notice of Motion to Compel Answer to Interrogatory.

(Caption.)

To—

Attorney for —.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, plaintiff (defendant) will move this court at — for an order compelling defendant (plaintiff) (John Doe, a witness herein on behalf of the defendant (plaintiff)) to answer the following interrogatories, which were submitted to him pursuant to order dated — —, 19—, (or which were served upon him by plaintiff (defendant) and dated — —, 19—) and which he has refused to answer:

1. _____.
2. _____.
3. _____.

Attorney for —.

Date—.

Address.

489. Order Compelling Answers to Interrogatories.

(Caption.)

This cause was heard on motion of plaintiff (defendant) for an order compelling defendant (plaintiff) (John Doe, a witness herein on behalf of defendant (plaintiff)) to answer interrogatories submitted to him which he refused to answer, and the court being fully advised, it is

Ordered, that defendant (plaintiff) (John Doe, a witness herein on behalf of defendant (plaintiff)) be and he is hereby directed to answer the following interrogatories which were served upon him by plaintiff (defendant) and dated — —, 19— (or which were submitted to him pursuant to order dated — —, 19—), and which he refused to answer:

1. _____.
2. _____.
3. _____.

Date_____.

United States district judge.

Note.

If the court finds that the refusal to answer was without substantial justification, the order may also direct the refusing party or deponent and the party or

attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

490. Order Denying Motion to Compel Answers to Interrogatories and Requiring Examining Party to Pay Expenses to Refusing Party.

(Caption.)

This cause was heard on motion of plaintiff to compel defendant to answer interrogatories served upon him and dated — —, 19—, which defendant refused to answer, and the court being fully advised, it is

Ordered, that plaintiff's motion be and it is hereby denied, and it appearing to the court that said motion was made without substantial justification, it is further

Ordered, that plaintiff be and he is hereby directed to pay to defendant the amount of the expenses incurred by him in opposing the motion, including attorney's fees, aggregating the sum of — dollars (\$—).

Date_____.

United States district judge.

Note.

The provision for payment by examining party of expenses of refusing party may be included in the above order only

if the court finds that the motion to compel answers was made without substantial justification.

491. Notice of Motion to Establish Facts for Failure to Comply with Order Requiring Answers to Questions.

(Caption.)

To_____

Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at —

for an order that the circumstances regarding the execution of the deed referred to in the complaint be taken to be established for the purposes of this action in accordance with the claim of defendant, to wit, that —, on the ground that plaintiff refused to obey an order of this court directing him to answer certain designated questions regarding the execution of said deed, as more fully appears from the annexed affidavit of —, sworn to on — —, 19—.

Attorney for defendant.

Date—.

Address.

Statutory Reference.

Judgment upon failure to produce books and writings, 8 F. C. A., Title 28, § 636; U. S. C. A., Title 28, § 636; id. U. S. C.

Federal Rules of Civil Procedure.

"If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

"If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defences, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

"(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination." Rule 37 (b).

NOTES TO DECISIONS

Contempt [Rule 37 (b) (1)].

A notice of motion is preferable to an order to show cause for the purpose of citing a person for contempt for failure to obey a subpoena. In re Tracy (C. C. A. 2), 106 Fed. (2d) 96.

A party refusing to submit to a physical examination in obedience to a court order may be punished as for contempt. Sibbach v. Wilson & Co., Inc. (C. C. A. 7), 108 Fed. (2d) 415.

Punishment for contempt in refusing to submit to a physical examination in obedience to a court order may be commitment to jail until compliance with the order. See Rule 37 (2) (iv). Sibbach v. Wilson & Co., Inc. (C. C. A. 7), 108 Fed. (2d) 415.

A party who has control over documents may be compelled to produce them even though they are not in his posses-

sion. *Bough v. Lee* (D. C.-N. Y.), 29 Fed. Supp. 498.

Failure to Comply with Order [Rule 37 (b)].

If a refusal to answer questions or produce documents at an examination before trial is not wilful but was based on advice of counsel, the witness should be directed to answer, and a motion to punish him for contempt should be denied. *Newcomb v. Universal Match Corp.* (D. C.-N. Y.), 25 Fed. Supp. 169.

In an action by a seaman for personal injuries, defendant ship owner was ordered to allow plaintiff to inspect and copy any reports made in the regular course of business with reference to plaintiff's injuries. Plaintiff should be permitted to inspect the log book, failing which, the motion to strike a portion of the answer for failure to comply with the order should be granted. *Murphy v. New York & Porto Rico S. S. Co.* (D. C.-N. Y.), 27 Fed. Supp. 878.

492. Order Establishing Facts for Failure to Obey Order Requiring Answers to Interrogatories.

(Caption.)

This cause was heard on defendant's motion for an order establishing facts because of refusal by plaintiff to answer designated questions after having been directed to do so by order of this court, and it appearing to the court that plaintiff has refused to answer interrogatories served upon him regarding the execution of the deed referred to in the complaint herein after having been directed to do so by order of this court dated ———, 19—, and the court being fully advised, it is

Ordered, that the circumstances regarding the execution of the deed referred to in the complaint be and they are hereby established for the purposes of this action, in accordance with the claim of defendant, to wit, that ———.

Date——.

United States district judge.

Cross-Reference.

In connection with Forms 492 to 495, see notes to Forms 486, 491.

493. Notice of Motion to Prohibit Introduction of Evidence for Failure to Obey Order Requiring Production of Documents.

(Caption.)

To——
Attorney for defendant.

Address.

Please take notice that on ———, 19—, at ——— M., or as soon thereafter as counsel can be heard, plaintiff will move this court at ——— for an order prohibiting defendant from introducing in evidence at the trial of this action [description of document], on the ground that defendant refused to obey an order of this court directing him to produce said

document for inspection by plaintiff as more fully appears from the annexed affidavit of —, sworn to on — —, 19—.

Attorney for plaintiff.

Date—.

Address.

**494. Notice of Motion to Dismiss the Action for Failure to Obey Order
Requiring Submission to Physical Examination.**

(Caption.)

To—
Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order dismissing this action, on the ground that plaintiff refused to obey an order of this court requiring him to submit to a physical examination, as more fully appears in the annexed affidavit of —, sworn to on — —, 19—.

Attorney for defendant.

Date—.

Address.

**495. Notice of Motion for Arrest of Party for Failure to Obey Order
Directing Him to Answer Questions.**

(Caption.)

To—
Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, plaintiff will move this court at — for an order directing the arrest of defendant, on the ground that he refused to obey an order of this court directing him to answer certain designated questions at the taking of his deposition, as more fully appears in the annexed affidavit of —, sworn to on — —, 19—.

Attorney for plaintiff.

Date—.

Address.

496. Notice of Motion to Require Payment of Expenses of Proof for Refusal to Admit.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, plaintiff will move this court at — for an order directing defendant to pay the reasonable expenses, including attorney's fees, incurred by plaintiff, aggregating — dollars (\$—), in making proof of the genuineness of documents (or the truth of matters of fact) which he denied upon a request for admission thereof, as more fully appears in the annexed affidavit of — sworn to on — —, 19—.

Attorney for plaintiff.

Date—.

Address.

Cross-Reference.

Advisory notes to Rule 37, Form 486.

Federal Rules of Civil Procedure.

"If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such docu-

ment or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made." Rule 37 (c).

497. Order for Payment of Expenses of Proof for Refusal to Admit.

(Caption.)

This cause was heard on plaintiff's motion for an order requiring defendant to pay the expenses incurred by plaintiff in making proof of the genuineness of documents which defendant denied upon a request for admission thereof, and it appearing to the court that plaintiff duly served upon defendant a request dated — —, 19—, for the admission of the genuineness of the deed to Blackacre from AB to CD, referred to in the complaint; that in the response dated — —, 19—, to said request for admission, defendant denied under oath the genuineness of said deed to Blackacre and that plaintiff subsequently proved the genuineness of said deed, and the court being fully advised, it is

Ordered, that defendant be and he is hereby directed to pay to plaintiff the reasonable expenses, amounting to — dollars (\$—), incurred by him in making proof of the genuineness of said deed to Blackacre, and

reasonable attorney's fees, amounting to — dollars (\$—), the total aggregating the sum of — dollars (\$—).

Date—.

United States district judge.

Cross-Reference.

In connection with Forms 497 and 498,
see notes to Form 496.

498. Order Denying Motion for Payment of Expenses of Proof for Refusal to Admit.

(Caption.)

This cause was heard on plaintiff's motion for an order requiring defendant to pay the expenses incurred by plaintiff in making proof of the genuineness of documents which defendant denied in reply to plaintiff's request for admission thereof, and the court being fully advised, and it appearing to the court that the admissions sought were of no substantial importance (or that defendant had good reason for making such denial), it is

Ordered, that the said motion of plaintiff be and it is hereby denied.

Date—.

United States district judge.

499. Notice of Motion for Judgment by Default for Failure of Party to Attend Taking of His Deposition or to Serve Answers to Interrogatories.

(Caption.)

To—
Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, plaintiff will move this court at — for an order herein directing entry of judgment for plaintiff by default, on the ground that defendant wilfully failed to appear for the taking of his deposition, after being served with a proper notice thereof (or failed to serve answers to interrogatories which were properly served upon him by plaintiff), as more fully appears from the annexed affidavit of —, sworn to on — —, 19—.

Attorney for plaintiff.

Date—.

Address.

Cross-Reference.

In connection with Forms 499 and 500, see notes to Form 486.

Statutory Reference.

Judgment upon failure to produce books and writings, 8 F. C. A., Title 28, § 636; U. S. C. A., Title 28, § 636; id. U. S. C.

500. Order Directing Entry of Judgment by Default for Failure of Party to Attend Taking of His Deposition or to Serve Answers to Interrogatories.

(Caption.)

This cause was heard on plaintiff's motion for an order directing entry of judgment for plaintiff by default, and the court being fully advised, and it appearing that defendant was properly served with notice dated ———, 19—, that his deposition would be taken before ———, at ———, on ———, 19—, and that defendant wilfully failed to appear before the officer so designated to take said deposition (or that defendant failed to serve answers to interrogatories after proper service thereof was made upon him), it is

Ordered, that judgment by default be entered herein in favor of plaintiff.

Date——.

United States district judge.

CHAPTER 17

TRIALS

Section

1. Jury Trials, Forms 510 to 525.
2. Dismissal of Actions, Forms 528 to 544.
3. Consolidation of Actions, Forms 547 to 551.

Section

4. Subpoenas, Forms 554 to 560.
5. Verdicts and Findings, Forms 563 to 574.

SECTION 1

JURY TRIALS

Form

510. Demand for trial by jury of all issues so triable.
511. Demand for trial by jury of certain specified issues.
512. Demand for trial by jury of additional specified issues.
513. Notice of motion to permit service of demand for trial by jury after time expired.
514. Order permitting service of demand for trial by jury after expiration of time prescribed therefor.
515. Motion to strike demand for trial by jury.
516. Order striking demand for trial by jury.
517. Consent to withdrawal of demand for trial by jury.

Form

518. Stipulation for trial by court after demand for trial by jury has been made.
519. Notice of motion for trial by jury notwithstanding failure of party to serve a demand therefor.
520. Order directing trial by jury notwithstanding failure of party to make demand therefor.
521. Motion for trial with an advisory jury.
522. Order for trial with an advisory jury.
523. Order for trial by jury in action not triable of right by jury.
524. Stipulation for trial by less than twelve jurors.
525. Order designating three-judge statutory court.

INTRODUCTION.—The constitutional right to a jury trial in actions at common law manifestly may not be and is not affected by the rules. The mode of invoking that right is, however, radically modified. A jury trial, if one is desired, must be affirmatively demanded. Failure to file such demand within the time fixed by the rules is deemed a waiver of a jury trial.

The rules empower the court to permit upon a proper showing the filing of such demand after the expiration of the time limit. They also contain provisions for jury trials in the discretion of the court in cases in which such a mode of trial may not be demanded as of right.

510. Demand for Trial by Jury of All Issues So Triable.

(Caption.)

To _____
 Attorney for plaintiff.

 Address.

Please take notice that defendant demands trial by jury herein.

 Attorney for defendant.

Date_____.

 Address.

Note.

A demand for trial by jury may be served as a separate document or indorsed on any pleading.

Cross-Reference.

Right of trial by jury, Rule 38 (a) of the Rules of Civil Procedure, see Appendix herein.

Statutory Reference.

Right of trial by jury, U. S. Const., 7th Amend., 8 F. C. A., Title 28, §§ 770 to 773; U. S. C. A., Title 28, §§ 770 to 773; id. U. S. C.

Federal Rules of Civil Procedure.

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party." Rule 38 (b).

"In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action." Rule 38 (c).

"The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A de-

mand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Rule 38 (d).

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." Rule 39 (a).

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." Rule 39 (b).

"In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." Rule 39 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 38: "This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act

(Act of June 19, 1934, 48 Stat. 1064, U. S. C., Title 28, § 723c), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill. Rev. Stat. (1937) ch. 110, § 188; 6 Tenn. Code Ann. (Williams, 1934) § 8734; compare Wyo. Rev. Stat. Ann. (1931) § 89-1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn. Gen. Stat. (1930) § 5624; Hawaii Rev. Laws (1935) § 4101; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 60; 3 Mich. Comp. Laws (1929) § 14263, Mich. Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r. r. 2 and 6; and Ontario Jud. Act (1927) § 57 (1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying, under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 3802; Calif. Code Civ. Proc. (Deering, 1937) § 631, par. 4; Iowa Code (1935) § 10724; 4 Nev. Comp. Laws. (Hillyer, 1929) § 8782; N. M. Stat. Ann. (Courtright, 1929) § 105-814; N. Y. C. P. A. (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens counties); R. I. Pub. Laws 1929, ch. 1327, amending R. I. Gen. Laws (1923) ch. 337, § 6; Utah Rev. Stat. Ann. (1933) § 104-23-6; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 316; England (4 days after notice of trial), Administration of Justice Act (1933) § 6 and amended rule under the Judicature Act, (The Annual Practice, 1937) O. 36, r. 1; Australia High Court Procedure Act (1921) § 12, Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup. Ct. Rules (1925) O. 36, r. r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r. r. 2 and 5. See James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L. J. 1022.

"Rule 81 (c) provides for claim for jury trial in removed actions.

"The right to trial by jury as declared in U. S. C., Title 28, § 770 (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U. S. C., Title 28, § 773 (Trial of issues of fact; by court)."

NOTE OF ADVISORY COMMITTEE TO RULE 39: "The provisions for express waiver of jury trial found in U. S. C., Title 28, § 773 (Trial of issues of fact; by court) are incorporated in this rule. See Rule 38, however, which extends the provisions for waiver of jury. U. S. C., Title 28, § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235 (1922).

"A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif. Code Civ. Proc. (Deering, 1937) § 592; 1 Colo. Stat. Ann. (1935) Code Civ. Proc., ch. 12, § 191; Conn. Gen. Stat. (1930) § 5625; 2 Minn. Stat. (Mason, 1927) § 9288; 4 Mont. Rev. Codes Ann. (1935) § 9327; N. Y. C. P. A. (1937) § 430; 2 Ohio Gen. Code Ann. (Page, 1926) § 11380; 1 Okla. Stat. Ann. (Harlow, 1931) § 351; Utah Rev. Stat. Ann. (1933) § 104-23-5; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 315; Wis. Stat. (1935) § 270.07. See Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U. S. C., Title 28, § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co. v. Savannah River Lumber Co.*, 280 Fed. 358 (C. C. A. 4th, 1922); *Fed. Res. Bk. of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F. (2d) 922 (C. C. A. 9th, 1925), cert. den. 270 U. S. 646 (1926); *Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826 (1879)."

NOTES TO DECISIONS

Advisory Jury and Trial by Consent
[Rule 39 (c)].

The parties in a jury-waived action may agree to submission of the case to

an advisory jury. (*American Lumbermens Mut. Casualty Co. v. Timms & Howard, Inc.* (C. C. A. 2), 108 Fed. (2d) 497.

Demand [Rule 38 (b)].

Plaintiff served a demand for trial by jury two days after the expiration of the time fixed by this rule. Service of the demand so soon after the last day of the prescribed period indicated that the failure to serve the demand within the time specified was not intentional and motion for a jury trial was granted. *Rogers v. Montgomery Ward & Co. (D. C.-N. Y.)*, 26 Fed. Supp. 707.

Efforts to file a demand for a jury trial later than ten days after service of the last pleading may be regarded as an application under Rule 6 (b) for leave to enlarge such period and should be granted if it appears that the failure to demand a jury was excusable. *Buggeln v. Standard Brands (D. C.-N. Y.)*, 27 Fed. Supp. 399.

A demand for trial by jury filed after expiration of the ten-day period prescribed by Rule 38 (b) should, in the discretion of the court, be stricken if it appears that the case is of such nature that it ought not to be tried by a jury. *Alfred Hofmann v. Textile Mach. Works (D. C.-Pa.)*, 27 Fed. Supp. 431.

Unfamiliarity with the rules is not a valid excuse for failure to demand trial by jury within the prescribed time, particularly in an action commenced after the effective date of the rules. *MacDonald v. Central Vermont R. Co., Inc. (D. C.-Conn.)*, 31 Fed. Supp. 298.

If an amendment abandons the claim for equitable relief contained in the original complaint and interposes a claim for common-law relief, the time to demand a trial by jury commences to run from the service of the amended complaint. *Glauber v. Agee Department Stores (D. C.-Ky.)*, 58 Bull. 32, 1 Fed. R. Dec. 137.

Right Preserved [Rule 38 (a)].

An action by a liability insurance company for declaratory judgment against its insured and a person claiming damages for injuries resulting from negligent operation of an automobile by insured is triable by jury as of right. *Pacific Indem. Co. v. McDonald (C. C. A. 9)*, 107 Fed. (2d) 446, affg. 25 Fed. Supp. 522.

Whether or not an action for declaratory relief is triable by jury depends on whether it would have been so triable if it had been brought at common law or in equity. *Pacific Indem. Co. v. Mc-*

Donald (C. C. A. 9), 107 Fed. (2d) 446, affg. 25 Fed. Supp. 522.

A party claiming damages for negligence against an insured person may not be deprived of his right to a jury trial by the bringing of an action by the insurer for declaratory relief. *Pacific Indem. Co. v. McDonald (C. C. A. 9)*, 107 Fed. (2d) 446, affg. 25 Fed. Supp. 522.

An action for a declaratory judgment which concerns the duty of a contract obligor to pay money on the fulfillment of a condition is triable by jury as of right, and this principle is applicable if the action seeks to adjudicate the liability of an insurance company on one of its policies. (*American Lumbermens Mut. Casualty Co. v. Timms & Howard, Inc. (C. C. A. 2)*), 108 Fed. (2d) 497.

An issue of "fraud in the consideration" given for a release is not triable by a jury as of right. *Hollingsworth v. General Petroleum Corp. (D. C.-Ore.)*, 26 Fed. Supp. 917.

A defendant pleading a legal counterclaim to an action for equitable relief is entitled to a jury trial of his counterclaim. *Union Cent. Life Ins. Co. v. Burger (D. C.-N. Y.)*, 27 Fed. Supp. 356.

It was discretionary with the court to order trial by jury where plaintiff failed to demand it within ten days after service of the last pleading due to unfamiliarity with the new rules, but in a case involving patent litigation, it refused to do so. *Alfred Hofmann v. Textile Mach. Works (D. C.-Pa.)*, 27 Fed. Supp. 431.

A demand for trial by jury filed after expiration of the ten-day period prescribed by Rule 38 (b) should, in the discretion of the court, be stricken if it appears that the case is of such nature that it ought not to be tried by a jury. *Alfred Hofmann v. Textile Mach. Works (D. C.-Pa.)*, 27 Fed. Supp. 431.

If demand is made for trial by jury, the opposing party may obtain a determination of the question as to whether the action is triable of right by a jury, by a motion to strike the demand. *Gunther v. H. W. Gossard Co. (D. C.-N. Y.)*, 27 Fed. Supp. 995; *United States Process Corp. v. Fort Pitt Brew. Co. (D. C.-Pa.)*, 29 Fed. Supp. 37.

An action for breach of a royalty contract is triable of right by a jury, although the complaint prays that defendant be enjoined from refusing access

to its plant to plaintiff, since the information sought by the injunction may be obtained by discovery. *United States Process Corp. v. Fort Pitt Brew. Co.* (D. C.-Pa.), 29 Fed. Supp. 37.

An action for patent infringement is not triable of right by a jury if the complaint demands injunctive relief. *Bellavance v. Plastic-Craft Novelty Co.* (D. C.-Mass.), 30 Fed. Supp. 37.

The new rules abolished only the procedural distinction between law and equity and not the distinction between legal and equitable remedies. A distinction must still be drawn between actions for legal relief and actions for equitable relief in order to determine whether a right to jury trial exists. *Bellavance v. Plastic-Craft Novelty Co.* (D. C.-Mass.), 30 Fed. Supp. 37.

In an action to recover on an insurance policy, defendant's motion to stay the proceedings on the ground that plaintiff could assert any claim she might have in another action previously filed by the insurance company to cancel the policy, was denied on the ground that since the last-mentioned action did not involve an issue triable of right by a jury, to stay the suit on the policy would operate to deny to plaintiff right to jury trial. *Prudential Ins. Co. v. Saxe* (D. C.-D. C.), 5 Bull. 9.

In an action for personal injury, plaintiff demanded trial by jury within two days after denial of defendant's motion to remand although about six months after filing of the answer. Defendant's motion to strike the demand was denied. *Isberg v. Schulz* (D. C.-Wash.), 26 Bull. 26.

Defendant in an action for injunctive relief and triple damages under the anti-trust laws is entitled to a jury trial on the question of damages. *Columbia River Packers Assn. v. Hinton* (D. C.-Ore.), 40 Bull. 39.

Trial by Jury [Rule 39 (a)].

If, in an action in which the defendant interposed a counterclaim arising out of

the same transactions as the plaintiff's claim, the plaintiff files a demand for a jury trial in due time in respect to the counterclaim but which is too late in respect to the plaintiff's claim, the court in the exercise of discretion may order a jury trial of all the issues. *Gunther v. H. W. Gossard Co.* (D. C.-N. Y.), 27 Fed. Supp. 995.

An action to enjoin infringement of a patent in which trial by jury has been demanded may be stricken from the jury calendar since such actions are not triable of right by a jury. *Bellavance v. Plastic-Craft Novelty Co.* (D. C.-Mass.), 30 Fed. Supp. 37.

In an action for breach of a contract, for inducing such breach, and to set aside a fraudulent assignment, all legal issues were held triable of right by a jury. The court ruled that immediately upon rendition of verdict, court would proceed to take additional evidence on purely equitable issues and try them. *Ford v. C. E. Wilson & Co., Inc.* (D. C.-Conn.), 30 Fed. Supp. 163.

While the time within which to serve a demand for trial by jury should not, under ordinary circumstances, be enlarged when failure to make the demand was due solely to inadvertence of counsel, nevertheless in a case removed from a state court when the rules had not been in effect long and lawyers were not fully familiar with their requirements, a motion for a jury trial presented approximately two months after time to demand a jury has expired was granted as a matter of discretion. *Gruskin v. New York Life Ins. Co.* (D. C.-Pa.), 48 Bull. 19, 1 Fed. R. Dec. 22.

Waiver [Rule 38 (d)].

A plaintiff in an action for equitable relief should not be permitted to amend his complaint at the trial by including a claim of a legal nature, as he would thereby deprive the defendant of the right to demand trial by jury. *Columbia River Packers Assn. v. Hinton* (D. C.-Ore.), 40 Bull. 39.

511. Demand for Trial by Jury of Certain Specified Issues.

(Caption.)

To _____

Attorney for defendant (plaintiff).

Address.

Please take notice that plaintiff (defendant) demands trial by jury herein of the following issues:

1. _____.
2. _____.
3. _____.

Attorney for plaintiff (defendant).

Date_____.

Address.

Note.

Within ten days after service of above demand any other party may demand trial by jury of any other issues.

Cross-Reference.

See notes to Form 510.

512. Demand for Trial by Jury of Additional Specified Issues.

(Caption.)

To_____

Attorney for plaintiff (defendant).

Address.

Please take notice that in addition to the issues specified in plaintiff's (defendant's) demand for trial by jury, defendant demands trial by jury of the following issues:

1. _____.
2. _____.
3. _____.

Attorney for defendant (plaintiff).

Date_____.

Address.

Cross-Reference.

In connection with Forms 512 to 523, see notes to Form 510.

513. Notice of Motion to Permit Service of Demand for Trial by Jury after Time Expired.

(Caption.)

To_____

Attorney for plaintiff.

Address.

Please take notice that on _____, 19____, at _____ M., or as soon thereafter as counsel can be heard, defendant will move this court at _____

for an order permitting him to serve a demand for trial by jury, notwithstanding the expiration of the period prescribed therefor, on the ground that the failure to serve said demand within the time prescribed was the result of excusable neglect, as more fully appears from the annexed affidavit of —, sworn to on — —, 19—.

Attorney for defendant.

Date—.

Address.

514. Order Permitting Service of Demand for Trial by Jury after Expiration of Time Prescribed Therefor.

(Caption.)

This cause was heard on motion by defendant for an order permitting him to serve a demand for trial by jury herein, notwithstanding the expiration of the time prescribed therefor, and it appearing to the court that the failure to serve said demand within said prescribed period was the result of excusable neglect, and the court being fully advised it is

Ordered, that defendant may have until — —, 19—, within which to serve a demand for trial by jury in this action.

Date—.

United States district judge.

515. Motion to Strike Demand for Trial by Jury.

(Caption.)

To—

Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, plaintiff will move this court at — for an order striking defendant's demand for trial by jury heretofore served on the ground that this is not an action in which a right of trial by jury exists under the Constitution or statutes of the United States.

Attorney for plaintiff.

Date—.

Address.

516. Order Striking Demand for Trial by Jury.

(Caption.)

This cause was heard on motion of plaintiff for an order striking defendant's demand for trial by jury, and it appearing that a right of trial by

jury in this action does not exist under the Constitution or statutes of the United States and that no sufficient reason has been shown why said action should be tried by a jury, and the court being fully advised, it is

Ordered, that defendant's demand for trial by jury served herein on ———, 19——, be and the same is hereby stricken.

Date——.

United States district judge.

517. Consent to Withdrawal of Demand for Trial by Jury.

(Caption.)

Plaintiff hereby consents to withdrawal by defendant of his demand for trial by jury, heretofore served.

Attorney for plaintiff.

Date——.

Address.

518. Stipulation for Trial by Court after Demand for Trial by Jury Has Been Made.

(Caption.)

It is hereby stipulated and agreed herein that, notwithstanding the demand for trial by jury heretofore served, the trial of this action shall be by the court sitting without a jury.

Attorney for plaintiff.

Address.

Attorney for defendant.

Date——.

Address.

519. Notice of Motion for Trial by Jury Notwithstanding Failure of Party to Serve a Demand Therefor.

(Caption.)

To——
Attorney for plaintiff.

Address.

Please take notice that on ———, 19——, at ——— M., or as soon thereafter as counsel can be heard, defendant will move this court at ——— for an order directing a trial by jury herein, notwithstanding no demand

therefore has been served, on the ground that this is an action in which such demand might have been made of right and defendant failed to make such demand, for reasons appearing in the annexed affidavit of —, sworn to on — —, 19—.

Attorney for defendant.

Date—.

Address.

520. Order Directing Trial by Jury Notwithstanding Failure of Party to Make Demand Therefor.

(Caption.)

This cause was heard on motion of defendant for an order directing trial by jury herein notwithstanding no demand therefor has been served, and it appearing to the court that this is an action in which such demand might have been made of right, and the court being fully advised, it is

Ordered, that trial by jury of the issues herein be and the same is hereby directed.

Date—.

United States district judge.

521. Motion for Trial with an Advisory Jury.

(Caption.)

To—
Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order directing trial of this action with the aid of an advisory jury, on the ground that this is not an action triable of right by a jury, but the issues of fact are such that the services of an advisory jury will be of material assistance to the court.

Attorney for defendant.

Date—.

Address.

522. Order for Trial with an Advisory Jury.

(Caption.)

This cause was heard on motion of defendant for an order directing trial of this action with an advisory jury, and it appearing to the court that this

action is not triable of right by a jury, and the court being fully advised, it is

Ordered, that the issues in this action be tried with an advisory jury.

Date_____.

United States district judge.

523. Order for Trial by Jury in Action Not Triable of Right by Jury.

(Caption.)

It appearing to the court that this is an action not triable of right by jury, and all parties consenting hereto, it is

Ordered, that the issues in this action be tried by a jury, whose verdict shall have the same effect as if trial by jury had been a matter of right.

Date_____.

United States district judge.

524. Stipulation for Trial by Less than Twelve Jurors.

(Caption.)

It is hereby stipulated that the jury in this action may consist of six (or any other number less than twelve) jurors (or that a finding in which more than one-half or any other stated majority of the jurors concur) shall be taken as the verdict or finding of the jury.

Attorney for plaintiff.

Address.

Attorney for plaintiff.

Address.

Date_____.

Federal Rules of Civil Procedure.

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." Rule 48.

NOTE OF ADVISORY COMMITTEE TO RULE 48: "For provisions in state codes, compare Utah Rev. Stat. Ann. (1933) § 48-0-5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three)."

525. Order Designating Three-Judge Statutory Court.

In the United States Court of Appeals for the
District of Columbia, — Term, 19—

— Company, Inc., —, —, —,
a corporation,
Plaintiff.

v.

—, Secretary of the Treasury of
the United States; —, Adminis-
trator of the Federal Alcohol Ad-
ministration; —, Commissioner of
Customs of the United States,
Defendants.

Civil No. —

Upon the request of Chief Justice —, of the District Court of the United States for the District of Columbia, before whom there is pending an application for a preliminary injunction in the above-entitled cause, I hereby designate —, Associate Justice of the United States Court of Appeals for the District of Columbia, and —, Associate Justice of the District Court of the United States for the District of Columbia, to participate with Chief Justice — as a three-judge statutory court to hear and determine said matter.

Chief Justice of the United States
Court of Appeals for the District of
Columbia.

Date—.

Statutory Reference.

Three-judge court necessary to enjoin
operation of state law, 8 F. C. A., Title

28, § 380; U. S. C. A., Title 28, § 380;
id. U. S. C.

SECTION 2**DISMISSAL OF ACTIONS****Form**

- 528. Notice of voluntary dismissal before service of answer.
- 529. Stipulation of dismissal.
- 530. Notice of motion for voluntary dismissal by order of court.
- 531. Notice of proposed dismissal of class action.
- 532. Order directing service of notice of proposed dismissal of a class action.
- 533. Notice of motion for leave to dismiss a class action.

Form

- 534. Order dismissing a class action.
- 535. Order dismissing action after answer served.
- 536. Order denying motion for voluntary dismissal after answer served.
- 537. Notice of motion to dismiss for failure to prosecute.
- 538. Order dismissing action for failure to prosecute.
- 539. Notice of motion for dismissal for failure to prosecute.

Form

540. Order of dismissal for failure to prosecute.
 541. Motion to dismiss.
 542. Order denying application for preliminary injunction and dismissing action.

Form

543. Notice of motion to require payment of costs of prior action voluntarily dismissed.
 544. Order requiring payment of costs of prior action voluntarily dismissed.

INTRODUCTION.—The rules introduce two novel features of importance in dismissal procedure. First, a plaintiff may dismiss his action as of right only prior to the filing of an answer. Such dismissal may be effected merely by filing an appropriate notice. Subsequently to the filing of an answer, leave of court granted in the exercise of discretion is required to permit a dismissal. Motion for such leave should be made on notice to all parties to the suit. Second, if a plaintiff dismisses two successive actions involving the same claim, the second dismissal operates as an adjudication on the merits.

528. Notice of Voluntary Dismissal before Service of Answer.

(Caption.)

To _____
 Attorney for defendant.

 Address.

Please take notice that, no answer having been served herein, this action is hereby dismissed without prejudice.

 Plaintiff.

Date ____.

 Address.

Note.

Above form may be used only before service of the answer.

Federal Rules of Civil Procedure.

"Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the

United States or of any state an action based on or including the same claim.

"Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Rule 41 (a).

"The provisions of this rule apply to the dismissal of any counterclaim, cross-

claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing." Rule 41 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 41 (a): "Compare Ill. Rev. Stat. (1937) ch. 110, § 176, and English Rules Under

the Judicature Act (The Annual Practice, 1937) O. 26.

"Provisions regarding dismissal in such statutes as U. S. C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U. S. C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1)."

NOTES TO DECISIONS

Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim [Rule 41 (c)].

Defendant filed an answer to intervenor's cross-claim and then a motion for leave to serve an amended answer setting up a counterclaim against the intervenor. By consent, hearing on the motion was delayed although parties stipulated that it should be deemed made and heard as of date filed, and in the meantime intervenor moved to withdraw from the case. Since the counterclaim had, for all practical purposes, been pleaded before the intervenor's motion for voluntary dismissal, the latter motion should be denied. *Russo-Asiatic Bank v. Guaranty Trust Co.* (D. C.-N. Y.), 27 Fed. Supp. 382.

In view of this rule a counterclaim seeking declaratory relief on the issues involved in the main action is redundant and should be stricken. *Stanley Works v. C. S. Mersick & Co.* (D. C.-Conn.), 18 Bull. 53, 1 Fed. R. Dec. 43.

Voluntary Dismissal—Effect Thereof [Rule 41 (a)].

Plaintiff's motion to dismiss complaint and defendant's counterclaim for declaratory judgment, made before effective date of new rules, should not have been granted after such date. *Leach v. Ross Heater & Mfg. Co.* (C. C. A. 2), 104 Fed. (2d) 38.

The court may not set aside a judgment without a showing of legal grounds therefor or excuse for the moving party's negligence or default, solely for the purpose of restoring the proceeding to a status whereby plaintiff might effectually move to dismiss without prejudice. *Western Union Tel. Co. v. Dis-mang* (C. C. A. 10), 106 Fed. (2d) 362.

A second voluntary dismissal operates as an adjudication upon the merits only

if it relates to an action pending in a court of the United States. *Rader v. Baltimore & O. R. Co.* (C. C. A. 7), 108 Fed. (2d) 980.

After an answer has been filed, plaintiff is not entitled to dismiss as a matter of right. *Cincinnati Trac. Bldg. Co. v. Pullman-Standard Car Mfg. Co.* (D. C.-Del.), 25 Fed. Supp. 322; *Delahanty v. Newark Morning Ledger Co.* (D. C.-N. J.), 26 Fed. Supp. 327; *Chandler Bldg. Corp. v. Shannon* (D. C.-D. C.), 23 Bull. 38, 1 Fed. R. Dec. 105.

In the absence of a showing requiring the court to dismiss the action upon special terms and conditions, plaintiff's motion to dismiss without prejudice should be granted. *United States v. Commercial Solvents Corp.* (D. C.-Del.), 25 Fed. Supp. 653.

In an action for patent infringement, plaintiff's motion to strike a counterclaim for declaratory judgment, which alleged noninfringement and invalidity, should be denied since, without such counterclaim, plaintiff could dismiss his action and thus leave undetermined the issue of validity. *Gregory v. Royal Typewriter Co.* (D. C.-N. Y.), 27 Fed. Supp. 808, 41 U. S. P. Q. 534.

Dismissal of an action which has been removed from a state to the federal court should not be conditioned upon any further litigation being had in the federal court, it appearing that if another suit was brought in the state court for less than \$3,000 it could be reached for trial sooner than an action in the federal court. *Lawson v. Moore* (D. C.-Va.), 29 Fed. Supp. 175.

Plaintiff may voluntarily dismiss a claim for relief after answer is served if he gave notice of his intention to do so before such service and it appears that service was made to frustrate notice of withdrawal. *Kohloff v. Ford*

Motor Co. (D. C.-N. Y.), 29 Fed. Supp. 843.

Parties to an action may not stipulate for its dismissal without the knowledge or consent of the plaintiff's attorney and thereby defeat any interest which the latter may have in the law suit. *Ingold v. Ingold* (D. C.-N. Y.), 30 Fed. Supp. 347.

Plaintiff may dismiss the action as of right at any time before answer, even if the defendant had previously made a motion to dismiss. *Sachs v. Italia Societa Anonima Di Navigazione* (D. C.-N. Y.), 30 Fed. Supp. 442.

The filing of notice of a second voluntary dismissal of a claim operates as an adjudication upon the merits although the previous dismissal was secured before the effective date of the new rules, provided the second dismissal is after such date. *Cleveland Trust Co. v. Osher & Reiss, Inc.* (D. C.-N. Y.), 31 Fed. Supp. 985.

Attorney under a contingent fee agreement does not have sufficient interest to support a motion to intervene in opposition to a proposed stipulation of dismissal executed by all of the parties. See

Rule 24. *Culmerville Coal Co. v. Downing* (D. C.-Ohio), 8 Bull. 11.

Plaintiff's motion to dismiss with prejudice filed after service of an answer which discloses that the suit is barred by the statute of limitations should be denied. *Baker v. Sisk* (D. C.-Okla.), 11 Bull. 17, 1 Fed. R. Dec. 232.

This rule was held applicable in an action begun over five years before the effective date of the new rules. *Chandler Bldg. Corp. v. Shannon* (D. C.-D. C.), 23 Bull. 38, 1 Fed. R. Dec. 105.

Motion by plaintiff for leave to dismiss should not be granted ex parte, but should be heard on notice to adverse parties. *Bloomfield v. Measuring Device Corp.* (D. C.-N. Y.), 30 Bull. 23, 1 Fed. R. Dec. 200.

A counterclaim may not be maintained solely for the purpose of preventing plaintiff from dismissing the action, since after answer plaintiff may dismiss only with consent of the court and leave to do so will not be granted except under proper circumstances. *Forstner Chain Corp. v. Gemex Co.* (D. C.-N. J.), 61 Bull. 38, 1 Fed. R. Dec. 115.

529. Stipulation of Dismissal.

(Caption.)

The undersigned, being all of the parties who have appeared generally herein, hereby stipulate that this action be dismissed, without prejudice and without costs.

Plaintiff.

Address.

Defendant.

Address.

Date_____.

Cross-Reference.

In connection with Forms 529 and 530, see notes to Form 528.

530. Notice of Motion for Voluntary Dismissal by Order of Court.
(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that on ———, 19—, at ——— M., or as soon thereafter as counsel can be heard, plaintiff will move this court at ——— for an order dismissing this action, on the ground that ———, more fully appearing in the annexed affidavit of ———, sworn to on ———, 19—.

Attorney for plaintiff.

Date——.

Address.

Note.

Above form may be used to obtain leave to dismiss an action after answer has been served.

531. Notice of Proposed Dismissal of Class Action.

It is ordered that all stockholders show cause before this court on ———, the ——— day of ———, 19—, at the post-office building, ———, ———, at ——— M., or as soon thereafter as counsel may be heard, why an order should not be entered dismissing the bill of complaint in the above-entitled cause with prejudice to any further action.

Source of Form.

Sauer v. Newhouse (D. C.-N. J.), 26 Fed. Supp. 326.

Federal Rules of Civil Procedure.

"A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it." Rule 23 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 23 (c): "See McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L. J. 421 (1937)."

NOTE OF ADVISORY COMMITTEE TO RULE 41 (a): "Compare Ill. Rev. Stat. (1937) ch. 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.

"Provisions regarding dismissal in such statutes as U. S. C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U. S. C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1)."

NOTES TO DECISIONS

Dismissal or Compromise [Rule 23 (c)].

The requirement that in a class action, notice of a proposed voluntary

dismissal or compromise should be given to all members of the class, is limited to an attempted dismissal by the plaintiff,

and such a notice is not a condition precedent to dismissal by the court after hearing on the merits. *Hutchinson v. Fidelity Inv. Assn. (C. C. A. 4)*, 106 Fed. (2d) 431.

In a representative stockholders' suit against officers of the corporation, the mailing to all stockholders, pursuant to the order of the court, of a copy of a rule to show cause why the suit should not be dismissed with prejudice, constitutes the notice of the proposed dismissal required by Rule 23 (c). *Sauer v. Newhouse (D. C.-N. J.)*, 26 Fed. Supp. 326.

Under Rule 23 a suit brought by a representative of the stockholders of a corporation alleging mismanagement of the corporation is properly dismissed where the plaintiffs sold their stock to a corporation organized to take over old

corporation. *Sauer v. Newhouse (D. C.-N. J.)*, 26 Fed. Supp. 326.

Where a representative suit by and on behalf of minority stockholders alleges fraud by majority stockholders and directors, and evidence has been taken but no order made, the complaint may not be dismissed without notice to all minority stockholders and approval of the court. *Delahanty v. Newark Morning Ledger Co. (D. C.-N. J.)*, 26 Fed. Supp. 327.

An application by the plaintiff to dismiss a representative stockholder's action in which a settlement was agreed upon should be granted if there is no reasonable probability of enforcing any judgment that may be obtained against the defendants. *Martin v. United Standard Oilfund of America, Inc. (D. C.-N. Y.)*, 30 Fed. Supp. 864.

532. Order Directing Service of Notice of Proposed Dismissal of a Class Action.

(Caption.)

It appearing that this is a secondary action by certain shareholders of the AB Corporation against the officers and directors thereof, and that John Doe, one of the plaintiffs, has moved for leave to dismiss (approval of compromise of) said action, and the court being fully advised, it is

Ordered, that notice of the proposed dismissal (or compromise) shall be given to all stockholders by publication of said notice in the —, a daily newspaper of general circulation in —, at least once each week for — consecutive weeks, beginning —, 19— (or by mailing a copy of said notice prior to —, 19—, to each of the shareholders of record of the AB Corporation as of —, 19—).

Date—.

United States district judge.

Cross-Reference.

In connection with Forms 532 to 534, see notes to Forms 528, 531.

533. Notice of Motion for Leave to Dismiss a Class Action.

(Caption.)

Please take notice that on —, 19—, at — M., or as soon thereafter as counsel can be heard, John Doe, one of the plaintiffs herein, will move this court at — for leave to dismiss this action.

Attorney for plaintiff.

Date—.

Address,

534. Order Dismissing a Class Action.

(Caption.)

This cause was heard on motion of plaintiff John Doe to dismiss this action, and it appearing that pursuant to an order made by this court notice of this motion was given to all stockholders of AB Corporation by (publication in the — Gazette) (mailing a copy thereof to each of the stockholders of record of the AB Corporation as of — —, 19—); and the court being fully advised, it is

Ordered, that this action be and the same is hereby dismissed without costs.

Date——.

United States district judge.**535. Order Dismissing Action after Answer Served.**

(Caption.)

This cause was heard on plaintiff's motion for an order dismissing this action without prejudice, and it appearing that an answer has been served herein, and the court being fully advised, it is

Ordered, that this action be and it is hereby dismissed without prejudice upon condition that plaintiff pay the accrued costs.

Date——.

United States district judge.**Cross-Reference.**

In connection with Forms 535 to 538,
see notes to Form 528.

536. Order Denying Motion for Voluntary Dismissal after Answer Served.

(Caption.)

This cause was heard on plaintiff's motion for an order dismissing this action without prejudice, and it appearing that an answer has been served herein, and the court being fully advised, it is

Ordered, that plaintiff's motion to dismiss this action without prejudice be and the same is hereby denied.

Date——.

United States district judge.

537. Notice of Motion to Dismiss for Failure to Prosecute.

(Caption.)

To _____
 Attorney for plaintiff.

 Address.

Please take notice that on _____, 19____, at _____ M., defendant will move this court for an order dismissing this action for failure to prosecute on the ground that plaintiff has failed and neglected to request that the case be placed on the trial calendar although the action has been at issue for more than _____ months.

 Attorney for defendant.

Date_____.

 Address.

Federal Rules of Civil Procedure.

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under

this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." Rule 41 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 41 (b): "This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50."

NOTES TO DECISIONS**Involuntary Dismissal—Effect Thereof [Rule 41 (b)].**

If plaintiff refuses to proceed in a removed action, after denial of his motion to remand, the action may be dismissed for failure to prosecute. *Dudley v. Community Public Service Co.* (C. C. A. 5), 108 Fed. (2d) 119.

A final judgment dismissing an action for failure to prosecute is appealable. *Dudley v. Community Public Service Co.* (C. C. A. 5), 108 Fed. (2d) 119.

Plaintiff sued the superintendent of insurance of Missouri for services rendered to an insurance company subsequently placed in the hands of defendant for liquidation, but at the trial failed to prove his case, and defendant's motion to dismiss under this rule was granted. Plaintiff then moved for a new trial un-

der Rule 59, which motion was denied. *Southwell v. Robertson* (D. C.-Pa.), 27 Fed. Supp. 944.

Plaintiff's failure to appear at a pre-trial conference ordered by the court, advance notice of which was given to the attorneys for both parties, constitutes a failure to prosecute and failure to comply with the rules, and defendant's motion to dismiss the action on the merits should be granted. *Wisdom v. Texas Co.* (D. C.-Ala.), 27 Fed. Supp. 992.

The motion to dismiss under this rule takes the place of the motion for a nonsuit under the former practice. *Kataoka v. May Dept. Stores Co.* (D. C.-Cal.), 28 Fed. Supp. 3.

Failure to serve a bill of particulars as directed is ground for dismissing the

action on motion of adverse party. *Botkins v. Sorter* (D. C.-La.), 29 Fed. Supp. 991.

Plaintiff may not dismiss because of lack of diversity of citizenship in regard to one of several defendants, after the case has gone to judgment. *Kataoka v. May Department Stores Co.* (D. C.-Cal.), 30 Fed. Supp. 346.

Dismissal on defendant's motion after plaintiff has completed presentation of his evidence on the ground that no right to relief has been shown is an adjudication on the merits unless otherwise specified by the court. *Kataoka v. May Department Stores Co.* (D. C.-Cal.), 30 Fed. Supp. 346.

After a judgment of dismissal on one ground has been entered, a motion to dismiss on another ground may not be entertained unless the previous judgment is first set aside. *Kataoka v. May Department Stores Co.* (D. C.-Cal.), 30 Fed. Supp. 346.

Defendant's motion to dismiss under this rule on the ground that there have been two previous voluntary dismissals of the same claim should be denied if both of them were had before the effective date of the new rules. *Cleveland Trust Co. v. Osher & Reiss, Inc.* (D. C.-N. Y.), 31 Fed. Supp. 985.

538. Order Dismissing Action for Failure to Prosecute.

(Caption.)

This cause was heard on defendant's motion to dismiss for failure to prosecute and it appearing that although issue herein has been joined for more than — months, plaintiff has failed to request that the case be placed on the trial calendar and has failed to take any other steps in the further prosecution of his claim and the court being fully advised, it is

Ordered, that this action be and it is hereby dismissed on the merits for failure to prosecute, with costs.

Date—.

United States district judge.

Cross-Reference.

In connection with Forms 538 to 542, see notes to Form 537.

539. Notice of Motion for Dismissal for Failure to Prosecute.

(Caption.)

To—
Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order dismissing this action, on the ground that plaintiff failed to appear at a pretrial conference ordered by the court, as more fully appears in the annexed affidavit of — —, sworn to on — —, 19—.

Attorney for defendant.

Date—.

Address.

540. Order of Dismissal for Failure to Prosecute.

(Caption.)

This cause was heard on defendant's motion to dismiss, and it appearing that plaintiff failed to appear at a pretrial conference herein on — —, 19—, pursuant to order of this court dated — —, 19—, due notice thereof having been served upon the attorneys for plaintiff, and the court being fully advised, it is

Ordered, that this action be, and it is hereby, dismissed with costs.

Date—.

United States district judge.**541. Motion to Dismiss.**

(Caption.)

The defendants, —, individually and as Secretary of the Treasury of the United States, —, individually and as Administrator of the Federal Alcohol Administration, a division of the Treasury Department, and —, individually and as Commissioner of Customs of the United States, by —, Esq., of Washington, D. C., United States Attorney for the District of Columbia, their attorney, move the court to dismiss the action on the following grounds:

1. The complaint fails to state a claim against the defendants, or any of them, upon which relief can be granted.
2. That as appears upon the face of the complaint no real or substantial dispute or controversy arising under the Constitution or laws of the United States is involved in this action.

—, United States Attorney, attorney for defendants, United States district court house, Washington, D. C., —, assistant Attorney-General, Washington, D. C., —, Special Assistant to the Attorney-General, Washington, D. C., of counsel.

Cross-Reference.

Defendants' motions, Forms 205 to 224.

542. Order Denying Application for Preliminary Injunction and Dismissing Action.

(Caption.)

This matter coming on to be heard upon the complaint, the rule to show cause why a preliminary injunction should not be issued against the defendants, entered on — —, 19—, the return of the said defendants to the said rule and the motion of the said defendants to dismiss the complaint and the action; and the court having been convened pursuant to Act of Congress of August 24, 1937, § 3, 50 Stat. 752 (U. S. C., Title 28, § 380a),

and having heard the arguments of counsel and being fully advised in the premises, it is now this — day of —, 19—, on motion of the defendants by their attorneys, Messrs. —, United States attorney for the District of Columbia, and —, Special Assistant to the Attorney-General:

Ordered, adjudged, and decreed that the said application for a preliminary injunction be and the same is hereby denied and the said rule to show cause be and the same is hereby discharged; and it is further

Ordered, adjudged, and decreed that the said motion of the defendants to dismiss the complaint be and the same hereby is granted and the said complaint and the within action are hereby dismissed accordingly.

FV. AW. JA.

Approved as to form. Exception noted. —, Attorney for plaintiff,
— Building, Washington, D. C.

Date—.

Cross-Reference.

Temporary and preliminary restraining orders and injunctions, Forms 135 to 152.

543. Notice of Motion to Require Payment of Costs of Prior Action Voluntarily Dismissed.

(Caption.)

To—

Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order requiring plaintiff to pay the costs, amounting to — dollars (\$—), imposed by the court of — in an action entitled, — v. —, previously instituted between the same parties and based upon the same claim as herein, and which was dismissed by plaintiff, as more fully appears from the annexed affidavit of —, dated — —, 19—; and staying further proceedings in this action until plaintiff has complied with such order.

Attorney for defendant.

Date—.

Address.

Federal Rules of Civil Procedure.

"If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the pay-

ment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order." Rule 41 (d).

NOTES TO DECISIONS

Costs of Previously-Dismissed Action
[Rule 41 (d)].

A motion to require plaintiff to pay costs of a prior action voluntarily dismissed wherein the cause of action and the parties were the same should be denied in the discretion of the court, if it appears that the prior action was dismissed because of interposition by defendant of objections in respect of service for the purpose of delaying or preventing the service of process. *Ayers v. Consor* (D. C.-Tenn.), 26 Fed. Supp. 95.

The trial of an action in a District Court of the United States and any

further proceedings, except filing pleadings, notices, and similar proceedings, therein was stayed by order of the court until payment by plaintiff of costs in a prior action in a state court, based on the same claim against the defendant, which was dismissed by plaintiff. *Graham v. John Kerns Constr. Co.* (D. C.-Iowa), 23 Bull. 39.

Plaintiff may be required to reimburse defendant for costs paid by the latter in a previous action which was voluntarily nonsuited, and pending action may be dismissed if such payment is not made. *Martin v. Southern R. Co.* (D. C.-Tenn.), 25 Bull. 11, 1 Fed. R. Dec. 98.

544. Order Requiring Payment of Costs of Prior Action Voluntarily Dismissed.

(Caption.)

This cause was heard on defendant's motion for an order requiring plaintiff to pay the costs in a prior action between the parties hereto and voluntarily dismissed by plaintiff, and it appearing that plaintiff heretofore instituted an action against the defendant herein in the — Court of —, based upon the same claim as that set forth in the complaint in the present action, which action was entitled, — v. —, that said prior action was subsequently dismissed by plaintiff, and that costs amounting to — dollars (\$—) were imposed against the plaintiff and in favor of the defendant, and that said costs have not been paid, and the court being fully advised, it is

Ordered, that plaintiff be and he is hereby directed to pay to the defendant the sum of — dollars (\$—), imposed as costs against said plaintiff in the action entitled, — v. — in — Court, and that all further proceedings herein be and they are hereby stayed until compliance with this order.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 543.

SECTION 3

CONSOLIDATION OF ACTIONS

Form	Form
547. Notice of motion to consolidate actions.	550. Notice of motion for joint trial of issues.
548. Order consolidating actions.	551. Order for joint trial of issues.
549. Notice of motion for separate trials.	

INTRODUCTION.—The Rules confer on the court plenary power to order a joint trial or to consolidate actions involving a common question of law or fact. By the same token, it may order separate trials of any claim, counterclaim, cross-claim, or third-party claim or of any separate issue. The entire matter rests in the discretion of the court.

547. Notice of Motion to Consolidate Actions.

(Captions of All Actions to be Consolidated.)

To _____
Attorney for plaintiff.

Address.

Please take notice that on ———, 19—, at ——— M., or as soon thereafter as counsel can be heard, defendant will move this court at ——— for an order consolidating all of the above-entitled actions, on the ground that all of said actions involve a common question of law (or fact), to wit: ———, and that the consolidation of said actions will tend to reduce unnecessary costs and delay.

Attorney for defendant.

Date——.

Address.

Federal Rules of Civil Procedure.

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Rule 42 (a).

"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." Rule 42 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 42: "Subdivision (a) is based upon U. S. C., Title 28, § 734 (Orders to save costs; consolidation of causes of like nature) but in so far as the statute differs from this rule, it is modified.

"For comparable statutes dealing with consolidation see Ark. Dig. Stat. (Crawford & Moses, 1921) § 1081; Calif. Code Civ. Proc. (Deering, 1937) § 1048; N. M. Stat. Ann. (Courtright, 1929) § 105-828; N. Y. C. P. A. (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV, (1919) Art. 26.

"For severance or separate trials see Calif. Code Civ. Proc. (Deering, 1937) § 1048; N. Y. C. P. A. (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art. 3, § 2 and Art. 10, § 10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12 (d) of these rules for preliminary hearings of defenses and objections.

"For the entry of separate judgments, see Rule 54 (b) (Judgment at Various Stages)."

NOTES TO DECISIONS

Consolidation [Rule 42 (a)].

Consolidation of cases for trial does not deprive parties of their constitutional right of trial by jury. *Cecil v. Missouri Public Service Corp.* (D. C.-Mo.), 28 Fed. Supp. 649.

Four actions for personal injuries against the same defendant, in which the injuries are alleged to have been caused at the same time by the same negligence, all issues being identical except the extent of each plaintiff's injuries, should be consolidated notwithstanding objection by plaintiffs. *Cecil v. Missouri Public Service Corp.* (D. C.-Mo.), 28 Fed. Supp. 649.

The Federal Rules of Civil Procedure should be applied so as to permit a demand for equitable relief filed after the effective date of the rules to be joined with an action for damages pending on such date, unless their application would not be feasible or would work injustice. *Frissell v. Rateau Drug Store* (D. C.-La.), 28 Fed. Supp. 816.

Actions between the same parties, and based upon the same allegations of fraud and conspiracy may be consolidated even before joinder of issue, if it appears that they involve a common question of law or fact. *Shultz v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 29 Fed. Supp. 38.

If the consolidation of actions tends to impose additional expenses upon certain defendants, the court may consider that fact in the allowance of costs. *Shultz v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 29 Fed. Supp. 38.

Consolidation of an action by an insurance company against the estate of the insured for a declaratory judgment on a life insurance policy with an action against the same company by the beneficiary of another policy on the life of the same insured was denied even though the two cases involved the same issues of fact, on the ground that the burden of proof in each case rested on a party standing in a different relative position and a consolidation would result in confusing complications. *Reliance Life Ins. Co. v. Fancher* (D. C.-Mo.), 30 Fed. Supp. 264.

Separate actions for negligence against the same defendant to recover

damages for increased flow of water, the defense being that the damages were caused by an Act of God, should not be consolidated for the trial of issues as to whether the negligence was the proximate cause of each plaintiff's injury or as to the amount of damages. The court reserved for future determination the question whether such actions should be consolidated for the trial of issues bearing on defendant's negligence. *Klager v. Inland Power & Light Co.* (D. C.-Wash.), 25 Bull. 12, 1 Fed. R. Dec. 114.

Separate Trials [Rule 42 (b)].

Pendency of a counterclaim does not prevent granting of motion for summary judgment on plaintiff's claim and ordering separate trial on counterclaim, when defendant admits the plaintiff's claim but obtains repeated continuances of the trial. *Seagram-Distillers Corp. v. Manos* (D. C.-S. C.), 25 Fed. Supp. 233.

When a legal counterclaim is set up in an equity action, the equitable issues should be disposed of first, after which, the trial of the legal issues may proceed. *Union Cent. Life Ins. Co. v. Burger* (D. C.-N. Y.), 27 Fed. Supp. 556; *Frissell v. Rateau Drug Store* (D. C.-La.), 28 Fed. Supp. 816.

In an action for personal injuries against a municipality, in which defendant alleged failure to file notice of claim within the time prescribed but conceded that the statute would be tolled during the incapacity of the plaintiff and for a reasonable time thereafter, a motion for a separate trial of the issue of incapacity was granted on condition that the defendant pay the plaintiff's expenses in connection with such trial. *Karolkiewicz v. Schenectady* (D. C.-N. Y.), 28 Fed. Supp. 343.

Separate trial of the issue of the statute of limitation may properly be ordered in a complicated action since a determination of that issue may dispose of the entire controversy. *Seaboard Terminals Corp. v. Standard Oil Co.* (D. C.-N. Y.), 30 Fed. Supp. 671.

Either plaintiff or defendant may seek a separate trial of one or more of the issues in an action. *Seaboard Terminals Corp. v. Standard Oil Co.* (D. C.-N. Y.), 30 Fed. Supp. 671.

548. Order Consolidating Actions.

(Captions of All Actions to be Consolidated.)

These causes were heard on defendant's motion to consolidate them, and it appearing that all of the above-entitled actions involve a common question of law (or fact) and that consolidation thereof will tend to reduce unnecessary expense and delay, and the court being fully advised, it is

Ordered, that the above-entitled actions be and they are hereby consolidated.

Date_____.

United States district judge.**Cross-Reference.**

In connection with Forms 548 to 551,
see notes to Form 547.

549. Notice of Motion for Separate Trials.

(Caption.)

To_____
Attorney for plaintiff._____
Address.

Please take notice that on ____ —, 19—, at ____ —. M., or as soon thereafter as counsel can be heard, defendant will move this court at ____ for a separate trial herein of the issues of the existence and duration of plaintiff's incapacity following receipt of his alleged injury, on the ground that failure to give notice of claim within thirty days after the injury or within a reasonable time after the termination of any incapacity resulting therefrom will bar plaintiff's claim for relief and obviate further proceedings herein.

Attorney for defendant.

Date_____.

Address.**550. Notice of Motion for Joint Trial of Issues.**

(Captions of All Actions as to which Joint Trial is Desired.)

To_____
Attorney for plaintiff._____
Address.

Please take notice that on ____ —, 19—, at ____ —. M., or as soon thereafter as counsel can be heard, defendant will move this court at ____ for an order directing a joint trial of the question as to whether the dam-

ages claimed in the above-entitled actions were caused by an act of God, on the ground that said question is common to all said actions and a joint trial of the said question will tend to avoid unnecessary costs and delay.

Attorney for defendant.

Date_____.

Address.

551. Order for Joint Trial of Issues.

(Captions of All Actions as to which Joint Trial is Desired.)

These causes were heard on defendant's motion for an order directing a joint trial of the issue as to whether the damages alleged in the above-entitled actions were caused by an act of God, and it appearing that said issue is common to all of said actions, and that a joint trial of the said issue will tend to reduce unnecessary expense and delay, and the court being fully advised, it is

Ordered, that a joint trial of the issue as to whether the damages alleged in the above entitled actions were caused by an act of God, be and the same is hereby directed.

Date_____.

United States district judge.

SECTION 4

SUBPOENAS

- | | |
|--|--|
| Form | Form |
| 554. Subpoena for attendance of witness. | 558. Order denying motion to quash subpoena for production of documents. |
| 555. Subpoena for production of documentary evidence. | 559. Notice of motion for issuance of a subpoena for the production of documentary evidence on taking of a deposition. |
| 556. Notice of motion to quash subpoena for production of documents. | 560. Order for issuance of a subpoena for the production of documentary evidence on the taking of a deposition. |
| 557. Order quashing subpoena for production of documents. | |

INTRODUCTION.—Subpoenas for attendance of witnesses and subpoenas duces tecum in connection with a trial are issued as of course by the clerk of the court in which the case is pending. Subpoenas for use in connection with the taking of a deposition are issued by the clerk of the District Court for the district in which the deposition is to be taken. While subpoenas for the attendance of witnesses are issued as of course, subpoenas duces tecum in connection with the taking of a deposition may be issued only pursuant to an order of the court. In this respect, the practice governing subpoenas

duces tecum varies according to whether they are to be used in connection with the trial or in connection with the taking of a deposition.

The validity or propriety of a subpoena may be tested by a motion to quash.

554. Subpoena for Attendance of Witness.

To _____

Address.

You are hereby commanded to appear in the District Court of the United States for the _____ District of _____, at the courthouse in the city of _____, in said district, on the _____ day of _____, 19____, at _____ M. of said day, then and there to testify on behalf of the _____ in an action pending in said court wherein _____ is plaintiff and _____ is defendant.

Witness, the Honorable _____, District Judge of the United States, this _____ day of _____, 19____, and in the _____ year of the Independence of the United States of America.

Clerk.

By _____

Deputy clerk.

Attorney for _____.

RETURN ON SERVICE

Received this writ at _____, on _____ and on _____ at _____, I served it on the within-named _____ and left a true copy thereof or a subpoena ticket with the person named above.

United States marshal.

By _____

Deputy.

Marshal's Fees

Travel..... \$ _____
Service..... \$ _____

\$ _____

Cross-References.

Subpoena in criminal cases, see Form 765 and note thereto.

In connection with Forms 554 to 558, see notes to Forms 555, 559.

Statutory References.

Form of subpoena, attendance thereunder, 8 F. C. A., Title 28, § 655; U. S. C. A., Title 28, § 655; id. U. S. C.

Subpoena for witnesses outside jurisdiction of U. S., 8 F. C. A., Title 28,

§§ 711 to 718; U. S. C. A., Title 28, §§ 711 to 718; id. U. S. C.

Subpoenas generally, 8 F. C. A., Title 28, §§ 631 to 718; U. S. C. A., Title 28, §§ 631 to 718; id. U. S. C.

Subpoenas may run into other districts, 8 F. C. A., Title 28, § 654; U. S. C. A., Title 28, § 654; id. U. S. C.

Federal Rules of Civil Procedure.

"Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service." Rule 45 (a).

"A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered." Rule 45 (c).

"(1) At the request of any party subpoena for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. * * *" Rule 45 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 45: "This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

"U. S. C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U. S. C., Title 15, § 49 (Federal Trade Commission)

U. S. C., Title 15, §§ 77v (b), 78u (c), 79r (d) (Securities and Exchange Commission)

U. S. C., Title 16, §§ 797 (g) and 825f (Federal Power Commission)

U. S. C., Title 19, § 1333 (b) (Tariff Commission)

U. S. C., Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

U. S. C., Title 26, §§ 614, 619 (b) (Board of Tax Appeals)

U. S. C., Title 26, § 1523 (a) (Internal Revenue Officers)

U. S. C., Title 29, § 161 (Labor Relations Board)

U. S. C., Title 33, § 506 (Secretary of War)

U. S. C., Title 35, §§ 54-56 (Patent Office proceedings)

U. S. C., Title 38, § 133 (Veterans' Administration)

U. S. C., Title 41, § 39 (Secretary of Labor)

U. S. C., Title 45, § 157 Third. (h) (Board of Arbitration under Railway Labor Act)

U. S. C., Title 45, § 222 (b) (Investigation Commission under Railroad Retirement Act of 1935)

U. S. C., Title 46, § 1124 (b) (Maritime Commission)

U. S. C., Title 47, § 409 (c) and (d) (Federal Communications Commission)

U. S. C., Title 49, § 12 (2) and (3) (Interstate Commerce Commission)

U. S. C., Title 49, § 173a (Secretary of Commerce)

"Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in U. S. C., Title 28, § 655 (Witnesses; subpoena; form; attendance under); and broaden U. S. C., Title 28, § 636 (Production of books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena duces tecum, compare N. Y. C. P. A. (1937) § 441.

"Note to Subdivision (c). This provides for the simple and convenient method of service permitted under many state codes; e. g., N. Y. C. P. A. (1937) §§ 220, 404, J. Ct. Act, § 191; 3 Wash. Rev. Stat. Ann. (Remington, 1932) § 1218. Compare Equity Rule 15 (Process, By Whom Served).

"For statutes governing fees and mileage of witnesses see:

"U. S. C., Title 28:

§ 600a (Per idem; mileage)

§ 600c (Amount per diem and mileage for witnesses; subsistence)

§ 600d (Fees and mileage in certain states)

§ 601 (Witnesses' fees; enumeration)

§ 602 (Fees and mileage of jurors and witnesses)

§ 603 (No officer of court to have witness fees)

* * *

"Note to Subdivision (e). The first paragraph continues the substance of U. S. C., Title 28, § 654 (Witnesses; subpoenas; may run into another district). Compare U. S. C., Title 11, § 69 (Referees in bankruptcy; contempt before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the

court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

"U. S. C., Title 15:

§ 23 (Suits by United States; subpoenas for witnesses) (under antitrust laws).

U. S. C., Title 38:

§ 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans' insurance contracts).

"The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U. S. C., Title 28, §§ 711 (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and 713 (Service of subpoena on witness in foreign country)."

* * *

NOTES TO DECISIONS

Form; Issuance.

Where a subpoena contained the usual provision that witness was not to depart the court without leave, the fact that the subpoena ordered the witness to attend on April 2 did not excuse his attendance at the trial on April 9, there having been a continuance until the later date. *Blackmer v. United States*, 284 U. S. 421, 76 L. ed. 375, 52 Sup. Ct. 252, affg. 60 App. D. C. 141, 49 Fed. (2d) 523.

The witness should be informed of the matter about which he will be called on to testify. In *re Shaw* (C. C.-N. Y.), 172 Fed. 520. See also *United States v. Ralston* (C. C.-Va.), 17 Fed. 895.

8 F. C. A., Title 28, §§ 574, 655; U. S. C. A., Title 28, §§ 574, 655; *id.* U. S. C.,

require that the names of as many witnesses as convenient in serving will permit be included in one subpoena. In *re Shaw* (C. C.-N. Y.), 172 Fed. 520.

A resident of a district in which the deposition is to be taken who resides and transacts his business in person in one county can not be required to attend an examination in any other county. *Lavere v. Continental Briar Pipe Co.* (D. C.-N. Y.), 25 Fed. Supp. 80, 790.

Service Rule 45 (c).

If the deposition of a party to the action is to be taken orally, it is not necessary to serve a subpoena or to pay fees and mileage. *Whitaker v. MacFadden Publications* (D. C.-N. Y.), 15 Bull. 29.

555. Subpoena for Production of Documentary Evidence.

(Caption.)

To _____

Address.

You are hereby commanded to appear in the District Court of the United States for the _____ District of _____ at the courthouse, in the city of _____,

in said district, on the — day of —, 19—, at —. M. of said day, and also that you bring with you and produce at the time and place aforesaid — then and there to testify on behalf of the (plaintiff or defendant) in an action pending in said court, wherein — is plaintiff and — is defendant.

Witness, the Honorable —, District Judge of the United States, this — day of —, 19—, and in the — year of the Independence of the United States of America.

Clerk.

By _____
Deputy clerk.

[SEAL]

Attorney for —.

RETURN ON SERVICE

(Caption.)

Received this writ at — on — and on —, at —, I served it on the within-named — and left a true copy thereof or a subpoena ticket with the person named above.

United States marshal.

By _____
Deputy.

Marshal's Fees

Travel..... \$ —
Service..... \$ —

\$ —

Cross-Reference.

Advisory notes to Rule 45 (b), see Form 554.

Statutory References.

Order of court for production of books and writings, 8 F. C. A., Title 28, § 636; U. S. C. A., Title 28, § 636; id. U. S. C.

Subpoena duces tecum, 8 F. C. A., Title 28, § 647; U. S. C. A., Title 28, § 647; id. U. S. C.

Federal Rules of Civil Procedure.

"A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents." Rule 45 (b).

NOTES TO DECISIONS

Production of Documentary Evidence.

A subpoena duces tecum directed to a corporation is not invalid because it does not conform to 8 F. C. A., Title 28, § 655; U. S. C. A., Title 28, § 655; *id.* U. S. C. Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. 538, Ann. Cas. 1912D, 558.

A motion under Rule 45 (b) to quash a subpoena for the production of documents, on the ground that such subpoena is unreasonable and oppressive, should be granted in the absence of a showing that the documents called for are material or probably material. The limitations of Rule 34 are equally applicable to subpoenas issued under this rule. *United States v. Aluminum Co. (D. C.-N. Y.)*, 26 Fed. Supp. 711.

Documents produced in response to a subpoena should be examined by the court before submission to opposing counsel, and a hearing granted to the producing party on the question as to whether they contain evidence which is material or probably material. *United States v. Aluminum Co. (D. C.-N. Y.)*, 26 Fed. Supp. 711.

Although a subpoena for the production of documents under Rule 45 (b) may be procured and served on the attorney for a party, he has the right to a determination by the court of the question of privilege. *Bough v. Lee (D. C.-N. Y.)*, 26 Fed. Supp. 1000.

A subpoena for the production of documents should contain a time limitation as to the period covered by the records demanded, but such limitation may appear from the allegations of the complaint. *403-411 East 65th St. Corp. v. Ford Motor Co. (D. C.-N. Y.)*, 27 Fed. Supp. 37.

A subpoena commanding the production of documentary evidence on the taking of a deposition should not be quashed if the materiality of the documents demanded is shown by the pleadings. *403-411 East 65th St. Corp. v. Ford Motor Co. (D. C.-N. Y.)*, 27 Fed. Supp. 37.

A bank may not be required by a subpoena duces tecum to produce a transcript of the account between a foreign branch of said bank and a customer of the branch, since such records are not within the control of the main office. *In re Harris (D. C.-N. Y.)*, 27 Fed. Supp. 480.

On motion of plaintiff in a patent suit to require the defendant to permit him to inspect and copy certain exhibits produced during the taking of depositions which had been placed in the custody of the court, a special master was appointed under Rule 53 to determine whether such exhibits were produced under Rule 34 or as in response to a subpoena duces tecum under this rule, and to report to the court which parts of such exhibits are material to the issues. *Stentor Elec. Mfg. Co. v. Klaxon Co. (D. C.-Del.)*, 28 Fed. Supp. 665.

In an action for accounting, a subpoena for the production of documentary evidence bearing not on plaintiff's right to an accounting but on the actual accounting, may be issued in advance of the trial of the main issue. *Fox v. House (D. C.-Okla.)*, 29 Fed. Supp. 673.

The issuance of a subpoena for the production of documentary evidence requiring production of voluminous records at great expense by a person other than a party to the action may be conditioned upon the advance of the reasonable cost thereof by the person seeking the subpoena. *Fox v. House (D. C.-Okla.)*, 29 Fed. Supp. 673.

Issuance of a subpoena for the production of documents should be deferred until after determination of the question of jurisdiction. *Fox v. House (D. C.-Okla.)*, 29 Fed. Supp. 673.

A person may not refuse to obey a subpoena duces tecum. He should either move to quash the subpoena or produce the papers so that the court may pass on their admissibility. *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Elec. Workers (D. C.-N. Y.)*, 29 Fed. Supp. 759.

In respect of the character of documents, the production of which may be required, Rule 34 and this rule must be interpreted as in *pari materia*. *United States v. Aluminum Co. (D. C.-N. Y.)*, 25 Bull. 15, 1 Fed. R. Dec. 62.

A subpoena duces tecum under this rule may be invoked only for the production of documents for use as evidence and not documents to be used to refresh a witness' recollection. *United States v. Aluminum Co. (D. C.-N. Y.)*, 25 Bull. 15, 1 Fed. R. Dec. 62.

556. Notice of Motion to Quash Subpoena for Production of Documents.

(Caption.)

To _____

Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order quashing the subpoena for the production of documents heretofore served on defendant and dated — —, 19—, on the ground that said subpoena is unreasonable and oppressive in that —.

Attorney for defendant.

Date—.

Address.**557. Order Quashing Subpoena for Production of Documents.**

(Caption.)

This cause was heard on defendant's motion for an order quashing a subpoena for the production of documents heretofore served on defendant on — —, 19—, and it appearing to the court that said subpoena is unreasonable and oppressive, and the court being fully advised, it is

Ordered, that the subpoena duces tecum heretofore served herein on defendant and dated — —, 19—, be and the same is hereby quashed.

Date—.

United States district judge.**558. Order Denying Motion to Quash Subpoena for Production of Documents.**

(Caption.)

This cause was heard on defendant's motion for an order quashing a subpoena for the production of documents heretofore served on defendant on — —, 19—, and the court being fully advised, it is

Ordered, that defendant's motion to quash said subpoena be and the same is hereby denied on condition that within — days from the date of this order the plaintiff advance to defendant the sum of — dollars (\$—) as the reasonable cost of producing the documents referred to in said subpoena.

Date—.

United States district judge.

559. Notice of Motion for Issuance of a Subpoena for the Production of Documentary Evidence on Taking of a Deposition.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that on _____, 19—, at _____ M., or as soon thereafter as counsel can be heard, plaintiff will move this court at _____ for an order for the issuance of a subpoena for the production of the documentary evidence hereinafter specified on the taking of the deposition of John Doe, as a witness herein, before _____ at _____ on _____, 19—, pursuant to notice dated _____, 19—:

1. _____.
2. _____.
3. _____.

The aforesaid documents are necessary for the following reasons:
This action is brought to _____.

The above-mentioned deposition is to be taken on the issue as to whether _____.

The documents listed above relate to _____ and are relevant to the issue because _____.

Attorney for plaintiff.

Date_____.

Address.

Cross-Reference.

See notes to Forms 554, 555.

Federal Rules of Civil Procedure.

"(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court." Rule 45 (d) (1).

NOTE OF ADVISORY COMMITTEE TO RULE 45 (d): "Note to Subdivision (d). The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning v. Boyle*, 112 Fed. 397 (S. D. N. Y., 1901). The requirement of an order for the issuance of a subpoena duces tecum is in accordance with U. S. C., Title 28, § 647 (Deposition under dedimus potestatem; subpoena duces tecum). The provisions of paragraph (2) are in accordance with common practice. See U. S. C., Title 28, § 648 (Deposition under dedimus potestatem; witnesses, when required to attend); N. Y. C. P. A. (1937) § 300; 1 N. J. Rev. Stat. (1937) 2:27-174."

NOTES TO DECISIONS**Place of Examination.**

The court may fix the place of examination before trial as to nonresidents of

the district and the place of their residence is immaterial so long as they may be reached by the process of the court.

Persons residing in Missouri, however, should not be compelled to attend such examination in New York and parties should not be so compelled without ade-

quate provision for their expenses. Norton v. Cooper-Jarrett (D. C.-N. Y.), 11 Bull. 18, 1 Fed. R. Dec. 92.

560. Order for Issuance of a Subpoena for the Production of Documentary Evidence on the Taking of a Deposition.

(Caption.)

This cause was heard on plaintiff's motion for an order for the issuance of a subpoena for the production of documentary evidence on the taking of the deposition of John Doe as a witness herein, and the court being fully advised, it is

Ordered, that a subpoena issue for the production of the documentary evidence, hereinafter specified, on the taking of the deposition of John Doe as a witness herein, to wit:

1. _____.
2. _____.
3. _____.

Date_____.

United States district judge.

Cross-Reference.

See notes to Form 559.

SECTION 5

VERDICTS AND FINDINGS

Form

- 563. Request for instructions to jury.
- 564. Instruction to jury to return special verdict.
- 565. Special verdict.
- 566. Notice of motion to set aside verdict and for judgment or for a new trial.
- 567. Order directing judgment on motion for directed verdict.
- 568. Order setting aside verdict and granting new trial.
- 569. Order setting aside verdict and directing judgment for moving party.

Form

- 570. Order denying motion to set aside the verdict.
- 571. Notice of motion for judgment in accordance with motion for directed verdict.
- 572. Findings of fact and conclusions of law.
- 573. Notice of motion for amendment of findings by the court.
- 574. Order amending findings by the court and the judgment accordingly.

INTRODUCTION.—The Rules provide for three types of verdicts: A general verdict in the customary form; a special verdict consisting of special findings or answers to questions; and a general verdict accompanied by answers to written interrogatories submitted to the jury by the court.

A motion for a directed verdict no longer constitutes a waiver of trial by jury even in cases in which all parties join in such motion. If such a

motion is made and denied and the case is submitted to a jury, such submission is deemed to have been made subject to a reservation and later determination of the legal questions involved.

563. Request for Instructions to Jury.

(Caption.)

Plaintiff (or defendant) requests the court to give to the jury the following instructions:

1. _____.
2. _____.
3. _____.

Attorney for plaintiff (defendant).

Date_____.

Address.

Federal Rules of Civil Procedure.

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury

retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." Rule 51.

NOTE OF ADVISORY COMMITTEE TO RULE 51: "Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals."

NOTES TO DECISIONS

In General.

There need not be an affirmative showing that the court informed counsel before argument of its proposed action upon requests for instructions, and in the absence of a showing to the contrary it will be presumed that the rule was complied with. *Dallas R. & Terminal Co. v. Sullivan* (C. C. A. 5), 108 Fed. (2d) 581.

A party may not object to the court's failure to submit special issues to the jury in a case submitted on a general charge. *Dallas R. & Terminal Co. v. Sullivan* (C. C. A. 5), 108 Fed. (2d) 581.

A party may not complain of the court's failure to give instructions which were not requested in writing. *Dallas R. & Terminal Co. v. Sullivan* (C. C. A. 5), 108 Fed. (2d) 581.

564. Instruction to Jury to Return Special Verdict.

(Caption.)

The jury are hereby required to answer the following questions:

I. Do you or do you not find as a matter of fact that the — Insurance Company waived the breach of the policy.

(Answer "yes" or "no.")

II. If your answer to the above question is "Yes," then on what date do you find that the — Insurance Company, through its agents, knew of the breach of the policy.

United States district judge.

Source of Form.

Manufacturers Casualty Ins. Co. v. Roach (D. C.-Md.), 25 Fed. Supp. 852.

Federal Rules of Civil Procedure.

"The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." Rule 49 (a).

"The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the

entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial." Rule 49 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 49: "The federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co. v. Peccarich*, 209 Fed. 568 (C. C. A. 8th, 1913) cert. den. 232 U. S. 727 (1914); *Spokane and I. E. R. Co. v. Campbell*, 217 Fed. 518 (C. C. A. 9th, 1914), aff'd. 241 U. S. 497 (1916); *Simkins*, Federal Practice (1934) § 186. The power of a territory to adopt by statute the practice under Subdivision (b) has been sustained. *Walker v. New Mexico and Southern Pacific R. R.*, 165 U. S. 593 (1897); *Southwestern Brewery and Ice Co. v. Schmidt*, 226 U. S. 162 (1912).

"Compare Wis. Stat. (1935) §§ 270.27, 270.28 and 270.30; *Green*, A New Development in Jury Trial (1927), 13 A. B. A. J. 715; *Morgan*, A Brief History of Special Verdicts and Special Interrogatories (1923), 32 Yale L. J. 575.

"The provisions of U. S. C., Title 28, § 400 (3) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule."

NOTES TO DECISIONS

General Verdict Accompanied by Answer to Interrogatories [Rule 49 (b)].

In an action for wrongful death of a boy brought by his parents and the administrator of his estate, the jury awarded a general verdict for plaintiffs and, in response to special interrogatories, answered that the verdict was for the parents and that nothing was awarded to the administrator. Since the general verdict and the answers were inconsistent, judgment might not be entered on the general verdict. The court directed entry of judgment for plaintiff parents and against plaintiff administrator. *Voelkel v. Bennett* (D. C.-Pa.), 31 Fed. Supp. 506.

Special Verdicts [Rule 49 (a)].

If the court requires a special verdict in the form of answers to interroga-

tories, then as to all issues not submitted to the jury, the court is assumed to have made findings in accordance with the judgment rendered. *Hinshaw v. New England Mut. Life Ins. Co.* (C. C. A. 8), 104 Fed. (2d) 45.

A party may not object to the court's failure to submit special issues to the jury in a case submitted on a general charge. *Dallas R. & Terminal Co. v. Sullivan* (C. C. A. 5), 108 Fed. (2d) 581.

This rule was invoked in an action for a declaratory judgment by an insurance company to secure declaration that it was not liable on a policy because of a breach by the insured, the question at issue being whether the insurer had waived the breach. *Manufacturers Casualty Ins. Co. v. Roach* (D. C.-Md.), 25 Fed. Supp. 852.

565. Special Verdict.

(Caption.)

We, the jury, having been required to return a special verdict in the form of answers to questions submitted to us by the court, answer said questions as follows:

1. Yes.
2. July 25, 1939.

Signed John Doe
Foreman.

Cross-Reference.

See notes to Form 564.

566. Notice of Motion to Set Aside Verdict and for Judgment or for a New Trial.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Please take notice that on ———, 19——, at ——— M., defendant will move this court at ——— for an order setting aside the verdict herein and the judgment entered thereon and for judgment in accordance with defendant's motion for a directed verdict, or in the alternative for a new trial on the following grounds:

1. There was no substantial evidence to sustain the verdict.
2. The court erred in denying defendant's motion for a directed verdict.

3. The court erred in refusing defendant's requested instructions to the jury numbered —, —, and —.
4. The court erred in overruling defendant's objections to the introduction in evidence of plaintiff's "Exhibit 41."
5. The court erred in instructing the jury as follows: —.

Attorney for defendant.

Date—.

Address.

Cross-References.

New trial in Court of Claims, see notes to Form 907.

Statutory Reference.

New trials, harmless errors, 8 F. C. A., Title 28, § 391; U. S. C. A., Title 28, § 391; id. U. S. C.

Federal Rules of Civil Procedure.

"* * * A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor." Rule 50 (a).

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may

reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." Rule 50 (b).

NOTE OF ADVISORY COMMITTEE TO RULE 50 (a): "The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner v. Motion Picture Patents Co.*, 254 U. S. 233; *Union Indemnity Co. v. United States*, 74 F. (2d) 645 (1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See *Simkins*, *Federal Practice* (1934) § 189."

NOTE OF ADVISORY COMMITTEE TO RULE 50 (b): "For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line v. Redman*, 295 U. S. 654 (1935); compare *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913).

"See *Northern Ry. Co. v. Page*, 274 U. S. 65 (1927), following the Massachusetts practice of alternative verdicts, explained in *Thorndike*, *Trial by Jury in United States Courts*, 26 *Harv. L. Rev.* 732 (1913). See also *Thayer*, *Judicial Administration*, 63 *U. of Pa. L. Rev.* 585, 600-601, and note 32 (1915); *Scott*, *Trial by Jury and the Reform of Civil Procedure*, 31 *Harv. L. Rev.* 669, 685 (1918); *Comment*, 34 *Mich. L. Rev.* 93, 98 (1935)."

NOTES TO DECISIONS

Reservation of Decision on Motion [Rule 50 (b)].

This rule does not abolish but emphasizes the necessity of a motion for a

directed verdict to raise the legal question as to the sufficiency of the evidence. *Baten v. Kirby Lbr. Corp.* (C. C. A. 5), 103 *Fed. (2d)* 272.

On appeal decided after the effective date of the new rules in an action which was tried before such date, the denial of a motion for judgment non obstante veredicto should be affirmed if the case was submitted to the jury following denial of motion for directed verdict without a reservation of the questions of law raised by the motion for directed verdict. *Aetna Casualty & Surety Co. v. First Nat. Bank* (C. C. A. 3), 103 Fed. (2d) 977.

When a party moves for directed verdict at the conclusion of the evidence, the court may discharge the jury from further consideration of the case to permit the court to consider questions of law and the further motion of such party, within ten days after discharge of the jury, for judgment in accordance with the motion for a directed verdict, may be granted. *Blue Bird Taxi Corp. v. American Fidelity & Casualty Co.* (D. C.-S. C.), 26 Fed. Supp. 808.

The court, after reserving decision on plaintiff's motion for a directed verdict, has the power, on plaintiff's motion, to set aside verdict for the defendant and to enter judgment for the plaintiff. *Bachnor v. Eickhoff & Co., Inc.* (D. C.-N. Y.), 27 Fed. Supp. 105.

When a motion for a directed verdict, made at the close of the evidence, has not been granted and a verdict for the

adverse party is subsequently rendered, a motion to set aside such verdict and the judgment entered thereon, coupled with an alternative motion for a new trial, should be denied if there is substantial evidence in support of the verdict. *Sampson v. Channell* (D. C.-Mass.), 27 Fed. Supp. 213.

After a verdict has been rendered, judgment for the other party may be entered upon a reserved question of law involved in a motion for a directed verdict. *Churchill v. Baltimore & O. R. Co.* (D. C.-Pa.), 30 Fed. Supp. 792.

A motion to set aside the judgment and to enter judgment for the moving party notwithstanding the verdict may be treated as a motion to set aside the verdict and the judgment entered thereon and for judgment in accordance with moving party's motion for directed verdict as if it were a motion strictly conforming to this rule. *Valanda v. Baum & Reissman, Inc.* (D. C.-Pa.), 31 Fed. Supp. 71.

When Made—Effect [Rule 50 (a)].

An oral statement of the grounds for a written motion for directed verdict is sufficient compliance with the rules requiring motions to state the grounds therefor. *Pickering v. Corson* (C. C. A. 7), 108 Fed. (2d) 546.

567. Order Directing Judgment on Motion for Directed Verdict.

(Caption.)

This action was heard on motion of plaintiff for judgment in accordance with the motion for a directed verdict made by him at the trial, the jury having disagreed, and the court being fully advised, it is

Ordered, that judgment be entered for the plaintiff against the defendant AB for the sum of — dollars (\$——) (if the action is brought for other relief than money damages, the relief to be awarded should be stated), together with the costs of this action.

Date——.

United States district judge.

Cross-Reference.

In connection with Forms 567 to 572, see notes to Form 566.

568. Order Setting Aside Verdict and Granting New Trial.

(Caption.)

This action was heard on defendant's motion to set aside the verdict for plaintiff and the judgment entered thereon and for a new trial and the court being fully advised, it is

Ordered, that the verdict heretofore rendered herein and the judgment entered herein on ———, 19—, be and the same are hereby set aside and a new trial is hereby granted.

Date——.

United States district judge.

Note.

If the new trial is to be limited to specified issues, add the following: "on the issues of ——."

569. Order Setting Aside Verdict and Directing Judgment for Moving Party.

(Caption.)

This action was heard on defendant's motion to set aside the verdict for plaintiff and the judgment entered thereon and for judgment for defendant on his motion for a directed verdict, and it appearing that there was no substantial evidence to sustain the verdict for plaintiff and the court being fully advised, it is

Ordered, that the verdict for plaintiff and the judgment entered on ———, 19—, be and the same are hereby set aside; and it is further

Ordered, that judgment be entered for defendant dismissing the action, with costs.

Date——.

United States district judge.

570. Order Denying Motion to Set Aside the Verdict.

(Caption.)

This action was heard on defendant's motion to set aside the verdict and the judgment entered thereon and for judgment for defendant in accordance with his motion for directed verdict or in the alternative for a new trial, and the court being fully advised, it is

Ordered, that the said motion to set aside the verdict and judgment be and the same is hereby denied.

Date——.

United States district judge.

571. Notice of Motion for Judgment in Accordance with Motion for Directed Verdict.

(Caption.)

To———
Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, plaintiff will move this court at — for judgment in accordance with his motion for a directed verdict, the jury having disagreed and having been discharged, on the following grounds:

1. [Any grounds sufficient to sustain a motion for a directed verdict.]
2. _____.
3. _____.

Attorney for plaintiff.

Date—.

Address.

572. Findings of Fact and Conclusions of Law.

(Caption.)

This action having been tried by the court without a jury, the court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. _____.
2. _____.
3. _____.

CONCLUSIONS OF LAW

1. _____.
2. _____.
3. _____.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 573.

Statutory References.

Findings by the court, 8 F. C. A., Title 28, § 773; U. S. C. A., Title 28, § 773; U. S. C. A., Title 28, § 773; id. U. S. C.

Findings in suits against the United States, 8 F. C. A., Title 28, § 764; U. S. C. A., Title 28, § 764; id. U. S. C.

Findings in suits in Court of Claims, 8 F. C. A., Title 28, § 764; U. S. C. A., Title 28, § 764; id. U. S. C.

Federal Rules of Civil Procedure.

"In all actions tried upon the facts without a jury, the court shall find the

facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Rule 52 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 52: "See Equity Rule 70½, as amended Nov. 25, 1935, (Findings of Fact and Conclusions of Law) and U. S. C., Title 28, § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U. S. C., Title 28, § 773 (Trial of issues of fact; by court) and 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.*, 204 Fed. 166 (C. C. A. 8th, 1913), cert. den. 229 U. S. 624 (1913); *Warren v. Keep*, 155 U. S. 265 (1894); *Furrer v. Ferris*, 145 U. S. 132 (1892); *Tilghman v. Proctor*, 125 U. S. 136, 149 (1888); *Kimberly v. Arms*, 129 U. S. 512, 524 (1889). Compare *Kaeser & Blair Inc. v. Merchants' Ass'n.*, 64 F. (2d) 575, 576 (C. C. A. 6th, 1933); *Dunn v. Trefry*, 260 Fed. 147, 148 (C. C. A. 1st, 1919).

"In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ. Code (Crawford, 1934) § 864; California, Code Civ. Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat. Ann. (1935) Code Civ. Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen. Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen. Laws (Ter. Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp. Laws (Hillyer, 1929) § 8783-8784; New Jersey, Sup. Ct. Rule 113, 2 N. J. Misc. 1197, 1239 (1924); New Mexico, Stat. Ann. (Courtright, 1929) § 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp. Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) § 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp. Laws

(1929) §§ 2525-2526; Utah, Rev. Stat. Ann. (1933) § 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub. Laws (1933) § 2069; Washington, 2 Rev. Stat. Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

"In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ. Proc. (Deering, 1937) § 956a; but see 20 Calif. Law Rev. 171 (1932); Colorado, *Johnson v. Kountze*, 21 Colo. 486, 43 Pac. 445 (1895), *semble*; Illinois, *Baker v. Hinricks*, 359 Ill. 138 (1934), *Weininger v. Metropolitan Fire Ins. Co.*, 359 Ill. 584 (1935); Minnesota, *State Bank of Gibbon v. Walter*, 167 Minn. 37, 38, 208 N. W. 423 (1926), *Waldron v. Page*, 191 Minn. 302, 253 N. W. 894 (1934); New Jersey, N. J. Comp. Stat. (2 Cum. Sup. 1911-1924) tit. 163, § 303, as interpreted in *Bussy v. Hatch*, 95 N. J. L. 56, 111 A. 546 (1920); New York, *York Mortgage Corporation v. Clotar Const. Corp.*, 254 N. Y. 128, 133 (1930); North Dakota, Comp. Laws Ann. (1913) § 7846, as amended by N. D. Laws 1933, ch. 208, *Milnor Holding Co. v. Holt*, 63 N. D. 362, 370, 248 N. W. 315 (1933); Oklahoma, *Wichita Mining and Improvement Co. v. Hale*, 20 Okla. 159, 167 (1908); South Dakota, *Randall v. Burk Township*, 4 S. D. 337, 57 N. W. 4 (1893); Texas, *Custard v. Flowers*, 14 S. W. (2d) 109 (1929); Utah, Rev. Stat. (1933) § 104-41-5; Vermont, *Roberge v. Troy*, 105 Vt. 134 (1933); Washington, 2 Rev. Stat. Ann. (Remington, 1932) §§ 309-316; *McCullough v. Puget Sound Realty Associates*, 76 Wash. 700, 136 Pac. 1146 (1913), but see *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1 (1915); West Virginia, *Kinsey v. Carr*, 60 W. Va. 449, 55 S. E. 1004 (1906), *semble*; Wisconsin Stat. (1935) § 251.09; *Campbell v. Sutliff*, 193 Wis. 370, 214 N. W. 374 (1927), *Gessler v. Erwin Co.*, 182 Wis. 315, 193 N. W. 363 (1924).

"For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see *Clark and Stone, Review of Findings of Fact*, 4 U. of Chi. L. Rev. 190, 215 (1937)."

NOTES TO DECISIONS

Effect [Rule 52 (a)].

The statement of facts upon which the Supreme Court will inquire, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must have all the sufficiency and perspicuity of a special verdict. *Burr v. Des Moines Nav. & R. Co.*, 1 Wall. (68 U. S.) 99, 17 L. ed. 561; *New Mexico v. United States Trust Co.*, 183 U. S. 535, 46 L. ed. 315, 22 Sup. Ct. 172.

Conclusiveness of special finding, where record does not contain all the evidence. *Fales v. New York Life Ins. Co.* (C. C. A. 6), 98 Fed. 234.

The provision of the rules that findings of fact are to be accepted on appeal unless clearly wrong is but the formulation of a rule long recognized and applied by courts of equity. *Guilford Constr. Co. v. Biggs* (C. C. A. 4), 102 Fed. (2d) 46; *United States v. Appalachian Elec. Power Co.* (C. C. A. 4), 107 Fed. (2d) 769.

Findings of fact by the court should not be disturbed on appeal when the evidence is conflicting and the credibility of witnesses is involved, unless it appears that the trial judge was clearly wrong. *Malloy v. New York Life Ins. Co.* (C. C. A. 1), 103 Fed. (2d) 439; *Anglo California Nat. Bank v. Lazard* (C. C. A. 9), 106 Fed. (2d) 693.

Findings of fact should not be set aside on appeal if the evidence in support thereof, aside from varying views of experts, although circumstantial and subject to interpretation, is without material conflict. *McKeever v. Fontenot* (C. C. A. 5), 104 Fed. (2d) 326.

This rule did not apply to an action brought more than 19 months before its effective date and dismissed about three months after it was brought. *Hill v. Ohio Casualty Ins. Co.* (C. C. A. 6), 104 Fed. (2d) 695.

This rule does not relieve the court of the duty to make special findings of fact and to state separate conclusions of law but emphasizes that duty. No requests for such findings, however, need be made by the parties. *Hill v. Ohio Casualty Ins. Co.* (C. C. A. 6), 104 Fed. (2d) 695; *Jackson County v. Alton R. Co.* (C. C. A. 8), 105 Fed. (2d) 633.

The findings of a master confirmed by the trial court in a case in which there is a great volume of conflicting evidence should not be set aside unless clearly erroneous. *Stonega Coke & Coal Co. v. Price* (C. C. A. 4), 106 Fed. (2d) 411.

In an action for breach of contract brought prior to but decided after the effective date of the Federal Rules of Civil Procedure, such rules are applicable and consequently findings of fact will not be set aside unless clearly erroneous. *Western Union Tel. Co. v. Nester* (C. C. A. 9), 106 Fed. (2d) 587.

Denial of motion for additional findings of fact and conclusions of law is not error if those made afford a clear understanding of the basis of the decision. *Tulsa City Lines, Inc. v. Mains* (C. C. A. 10), 107 Fed. (2d) 377.

In an action by the government to enjoin the construction of a dam, without license therefor, across an alleged navigable stream, the court found that the stream was not navigable and dismissed the action. The Court of Appeals regarded a careful review of the evidence particularly necessary in view of the importance of the case but declined to set aside the findings of the court, there being no clear error in respect thereto. *United States v. Appalachian Elec. Power Co.* (C. C. A. 4), 107 Fed. (2d) 769; *Green Valley Creamery, Inc. v. United States* (C. C. A. 1), 108 Fed. (2d) 342.

Findings in actions under R. S., § 4915 (9 F. C. A., Title 35, § 63; U. S. C. A., Title 35, § 63; *id.* U. S. C.) to establish priority of right to a patent are subject to appellate review under Rule 52 as in other cases tried by the court without a jury. *Nichols v. Minnesota Min. & Mfg. Co.* (C. C. A. 4), 109 Fed. (2d) 162.

Findings must be of ultimate facts. *W. L. Perkins & Co. v. Von Baumbach* (C. C. A. 8), 185 Fed. 265.

Opinion of trial court not finding of fact and not binding on review. *J. W. McKim Corp. v. Whelan* (C. C. A. 8), 8 Fed. (2d) 241.

Where trial by jury is waived by written stipulation, refusal of findings of fact tendered is not error. *Ozark Pipe Line Corp. v. Decker* (C. C. A. 8), 32 Fed. (2d) 66.

A conclusion stated in the course of a general opinion is not a statutory find-

ing. *Morrison Mill Co. v. Hartford Fire Ins. Co.* (C. C. A. 9), 35 Fed. (2d) 862, affg. 32 Fed. (2d) 271.

The findings may be held to support the judgment, though the finding of the ultimate fact as to title is contained in the conclusions of law. *Bogan v. Hynes* (C. C. A. 9), 65 Fed. (2d) 524. Cert. den. 290 U. S. 690, 78 L. ed. 594, 54 Sup. Ct. 126.

Evidentiary exhibits do not constitute ultimate facts. *Ocean Acc. & Guarantee Corp. v. Brandeis* (C. C. A. 8), 75 Fed. (2d) 605. Cert. den. 295 U. S. 764, 79 L. ed. 1706, 55 Sup. Ct. 923.

Where all facts were stipulated and there was no request for special findings, minute order and judgment constituting a general finding were sufficient. *McLaughlin v. Coos Bay Lbr. Co.* (C. C. A. 9), 80 Fed. (2d) 763.

A memorandum opinion is not a finding of fact or a conclusion of law. *Martin v. Drexel Ice Cream Co.* (C. C. A. 7), 80 Fed. (2d) 768.

Undertaking made several terms after judgment, while appeal was pending, by a nunc pro tunc order to convert court's memorandum opinion into findings of fact and conclusions of law was ineffective. *Martin v. Drexel Ice Cream Co.* (C. C. A. 7), 80 Fed. (2d) 763.

An order of the court dismissing the complaint and an order directing the entry of judgment amount to a general finding that satisfies the requirements of 8 F. C. A., Title 28, § 773; U. S. C. A., Title 28, § 773; id. U. S. C. *Day-Gormley Co. v. National City Bank* (C. C. A. 2), 89 Fed. (2d) 703.

The court need not make findings of fact and conclusions of law in passing on the report of a referee, which contains findings. *United States v. Bethlehem Steel Corp.* (D. C.-Pa.), 26 Fed. Supp. 259.

Findings should contain only essential facts and should not include evidence. *Penmac Corp. v. Esterbrook Steel Pen Mfg. Co.* (D. C.-N. Y.), 27 Fed. Supp. 86.

Findings of fact and conclusions of law must be separately stated. A statement at the end of the opinion that it should stand as the findings of fact and conclusions of law in the case does not comply with the rule. *Penmac Corp. v. Esterbrook Steel Pen Mfg. Co.* (D. C.-N. Y.), 27 Fed. Supp. 86; *Detective Comics v. Bruns Publications* (D. C.-N. Y.), 28 Fed. Supp. 399.

Cross-findings need not be submitted by defeated party. *Penmac Corp. v. Esterbrook Steel Pen Mfg. Co.* (D. C.-N. Y.), 27 Fed. Supp. 86; *Detective Comics v. Bruns Publications* (D. C.-N. Y.), 28 Fed. Supp. 399; *Porto Rican American Tobacco Co. v. City Bank Farmers Trust Co.* (D. C.-N. Y.), 47 Bull. 17, 1 Fed. R. Dec. 20.

Formal findings of fact are not required if all statements of fact made on behalf of either party are admitted in the pleadings. *United States Trust Co. v. Sears* (D. C.-Conn.), 29 Fed. Supp. 643.

Findings of fact and conclusions of law separately numbered should be filed in all nonjury cases. *Associates Discount Corp. v. Crow* (App. D. C.), 110 Fed. (2d) 126; *Porto Rican American Tobacco Co. v. City Bank Farmers Trust Co.* (D. C.-N. Y.), 47 Bull. 17, 1 Fed. R. Dec. 20.

In the absence from the record on appeal of the evidence upon which the case was decided and of findings of fact in an action tried without a jury, no review thereof may be had and the case may be reversed and remanded for further proceedings. *Fogle v. General Credit, Inc.* (C. A.-D. C.), 110 Fed. (2d) 128.

573. Notice of Motion for Amendment of Findings by the Court.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Please take notice that on _____, 19____, at _____, M., defendant will move this court at _____ for an order amending its findings herein and

amending the judgment accordingly on the ground that paragraph four of said findings states that plaintiff's intestate, John Doe, died on November 6, 1937, whereas in fact and the undisputed evidence adduced at the trial shows that the said John Doe died on November 6, 1938.

Attorney for defendant.

Date_____.

Address.

Cross-Reference.

See notes to Form 572.

Federal Rules of Civil Procedure.

"Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for

a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment." Rule 52 (b).

574. Order Amending Findings by the Court and the Judgment Accordingly.

(Caption.)

This action was heard on defendant's motion for an order amending the findings of the court herein and amending the judgment accordingly, and the court being fully advised, it is

Ordered, that paragraph four of the findings by the court herein be and the same hereby is amended to read as follows: "Plaintiff's intestate, John Doe, died on November 6, 1938." and it is further

Ordered, that the judgment for plaintiff entered in this action on _____, 19____, be and the same is hereby amended to read as follows: [Here insert].

Date_____.

United States district judge.

Cross-Reference.

See notes to Forms 572, 573.

CHAPTER 18

MASTERS

- | Form | Form |
|---|---|
| 580. Notice of motion for general reference to special master. | 591. Notice setting time and place for hearing before master. |
| 581. Order of general reference to special master. | 592. Notice of motion to continue hearing before master. |
| 582. Order of general reference to a master in nonjury action. | 593. Order continuing hearing before master. |
| 583. Order of reference to a master in jury action. | 594. Submission of draft of master's report to counsel. |
| 584. Order referring specific issue of fact to master. | 595. Master's report. |
| 585. Order referring specific issues to a master. | 596. Report of special master on specific issue. |
| 586. Interlocutory judgment referring accounting to master. | 597. Report of special master on accounting. |
| 587. Interlocutory judgment referring patent suit to master on accounting. | 598. Objections to master's report. |
| 588. Stipulation of reference to special master. | 599. Order sustaining objections to master's report. |
| 589. Order of reference to master in a suit in equity before the new rules. | 600. Order overruling objections to master's report. |
| 590. Master's oath. | 601. Notice of motion to adopt master's report. |
| | 602. Order allowing master's compensation. |

INTRODUCTION.—The Rules contemplate two general types of references to masters. In nonjury cases, the master makes a report consisting of findings of fact and conclusions of law, to which is annexed a transcript of the evidence taken before him. Objections to the report may then be filed and the case is heard by the court on such objections. In jury actions, the master files his report without annexing the transcript of the evidence. His findings are admissible at the trial as evidence of the facts found.

In addition, a limited reference may be made to a master to report on a specific issue or to perform a particular act.

The Rules contain an admonition that "a reference to a master shall be the exception and not the rule."

580. Notice of Motion for General Reference to Special Master.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that on ———, 19—, at ——. M., plaintiff will move this court at ——— for an order appointing a special master to hear the evidence and to make findings of fact and conclusions of law, and to report the same to the court on the ground that the issues in this action are unusually complicated and will require the taking of much evidence and the examination of many voluminous documents.

Date——.

Attorney for plaintiff.

Federal Rules of Civil Procedure.

"* * * As used in these rules the word 'master' includes a referee, an auditor, and an examiner. * * *"
Rule 53 (a).

"A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it." Rule 53 (b).

"The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all

books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 53 (c).

NOTE OF ADVISORY COMMITTEE TO RULE 53 (a): "This is a modification of Equity Rule 68 (appointment and compensation of masters)."

NOTE OF ADVISORY COMMITTEE TO RULE 53 (b): "This is substantially the first sentence of Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. ed. 919 (1920)."

NOTE OF ADVISORY COMMITTEE TO RULE 53 (c): "This is Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.)."

NOTES TO DECISIONS

Appointment and Compensation [Rule 53 (a)].

The evils of delay and added expense are both inherent in references. In *re Irving-Austin Bldg. Corp.* (C. C. A. 7), 100 Fed. (2d) 574.

In an action for the recovery of commissions claimed to have been earned, involving numberless intricate accounts, the court will appoint an auditor, under the authority of this rule, to make a preliminary examination, to save the

time of the court, jury, and counsel. *Newcomb v. Universal Match Corp.* (D. C.-Ky.), 25 Fed. Supp. 169.

Reference [Rule 53 (b)].

Reference to masters should seldom be made and, if at all, only when unusual circumstances exist. *Irving-Austin Bldg. Corp. v. Cunningham* (C. C. A. 7), 100 Fed. (2d) 574.

A fraud issue ordinarily is not proper one for reference to a special master.

Irving-Austin Bldg. Corp. v. Cunningham (C. C. A. 7), 100 Fed. (2d) 574.

Appellate Court affirmed reference to an auditor in an action on a veteran's insurance policy holding that the ruling was within the discretion of the trial court, but observed that "it is far better practice, except where stress of work or other good cause is shown, for the court to try cases where the determination of the issues is dependent upon the credibility of the witnesses. Coyner v. United States (C. C. A. 7), 103 Fed. (2d) 629.

In an action for infringement of a patent against a nonresident partnership, the questions whether defendants have a regular place of business within the jurisdiction of the court and whether the person upon whom the summons was served is such as to make the service binding upon defendants, may be referred to a special master for determination. Schlessinger v. Ingber (D. C.-N. Y.), 29 Fed. Supp. 581.

Motion to quash service of process on the ground that defendant corporation was not doing business within the state and that summons was not served on a proper representative of the defendant, raising complicated issues of fact, may be referred to a special master. Lazar v. Cecelia Co. (D. C.-N. Y.), 1 Fed. R. Dec. 66.

Powers [Rule 53 (c)].

On motion of plaintiff in a patent suit to require the defendant to permit him to inspect and copy certain exhibits produced during the taking of depositions which had been placed in the custody of the clerk of the court, a special master was appointed to determine whether such exhibits were produced under Rule 34 or as in response to a subpoena duces tecum under Rule 45, and to report to the court which parts of such exhibits are material to the issues. Stentor Elec. Mfg. Co. v. Klaxon Co. (D. C.-Del.), 28 Fed. Supp. 665.

581. Order of General Reference to Special Master.

(Caption.)

This action was heard on plaintiff's motion to refer this action to a special master to hear the evidence herein and to report thereon to the court and the court being fully advised, it is

Ordered, that — be and he is hereby appointed special master herein and that the action be referred to him to hear the evidence and to make special findings of fact and conclusions of law thereon and to report the same to this court.

Date——.

United States district judge.

Cross-Reference.

In connection with Forms 581 to 591, see notes to Form 580.

582. Order of General Reference to a Master in Nonjury Action.

(Caption.)

This action was heard on plaintiff's motion that this action be referred to a special master and the court being fully advised, it is

Ordered, that — be and he is hereby appointed special master to take evidence and make findings of fact and conclusions of law and report the same to this court, together with a transcript of the evidence taken before him as to all of the issues in this action.

Date——.

United States district judge.

Cross-Reference.

In connection with Forms 582 to 587,
see notes to Form 598.

583. Order of Reference to a Master in Jury Action.

(Caption.)

This action was heard on plaintiff's motion that this action be referred to a special master, and the court being fully advised, it is

Ordered, that — be and he is hereby appointed special master to take evidence and make and report findings of fact and conclusions of law to this court as to all of the issues in this action.

Date——.

United States district judge.

584. Order Referring Specific Issue of Fact to Master.

(Caption.)

This action was heard on motion of plaintiff to appoint a special master herein and the court being fully advised, it is

Ordered, that — be and he is hereby appointed special master herein to take evidence and report the findings of fact and conclusions of law as to whether —.

Date——.

United States district judge.

585. Order Referring Specific Issues to a Master.

(Caption.)

This action having come on for hearing on motion of defendant to quash service of process on the ground that defendant corporation was not doing business within this state and that summons was not served on a proper representative of the defendant and it appearing that the determination of said motion will involve complicated issues of fact, it is hereby

Ordered, that this action be and it is hereby referred to — as special master to take evidence and report the findings of fact to this court on the question as to whether —.

Date——.

United States district judge.

586. Interlocutory Judgment Referring Accounting to Master.

(Caption.)

This action came on to be tried before the court and the court having taken evidence and having made special findings of fact and conclusions of law, it is

Adjudged, that the plaintiff is entitled to recover of the defendant commissions at the rate of — per cent. (—%) on all sales of — made by him on behalf of the defendant from —, 19—, to —, 19—, inclusive; and it is further

Adjudged, that this cause be and it is hereby referred to — as special master to take and state an account and to ascertain and report to this court the amount of such commissions earned by plaintiff from —, 19—, to —, 19—, inclusive, the amount of such commissions heretofore paid to plaintiff by defendant and the amount of such commissions remaining unpaid.

Date—.

United States district judge.**587. Interlocutory Judgment Referring Patent Suit to Master on Accounting.**

(Caption.)

This action was tried by the court and the court having taken evidence and having made special findings of fact and conclusions of law, it is

Adjudged, that the plaintiff is the owner and sole proprietor of letters patent of the United States No. — issued on —, 19—, to —; that said letters patent are valid; and that defendant has infringed said letters patent, and it is further

Adjudged, that this cause be referred to — as special master to ascertain and report to this court the amount of damages that plaintiff has sustained by reason of the infringement of said letters patent by the defendant.

Date—.

United States district judge.**588. Stipulation of Reference to Special Master.**

(Caption.)

It is hereby stipulated and agreed that this action be referred to a

special master to take evidence and report his findings of fact and conclusions of law to this court and that said findings of fact shall be final.

Attorney for defendant.

Address.

Attorney for plaintiff.

Address.

Federal Rules of Civil Procedure.

"The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered." Rule 53 (e) (4).

NOTE OF ADVISORY COMMITTEE TO RULE 53 (e): "This contains the substance of Equity Rules 61 (Master's Report—Documents Identified but not Set Forth), 61½ (Master's Report—Presumption as

to Correctness—Review), and 66 (Return of Master's Report—Exceptions—Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v. Stuart*, 144 U. S. 104 (1892); *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. ed. 919 (1920)."

NOTES TO DECISIONS

Report [Rule 53 (e)].

A master's finding of negligence in a claim for personal injuries against traction company whose affairs were being administered by the bankruptcy court should be accepted unless clearly erroneous. In *re Connecticut Co.* (C. C. A. 2), 107 Fed. (2d) 734.

A master's report should not be rejected solely because it does not contain findings of ultimate facts sufficient to sustain his conclusions, but may be returned for clarification. In *re Connecticut Co.* (C. C. A. 2), 107 Fed. (2d) 734.

The rule that in actions tried before a master, the court shall accept the mas-

ter's findings of fact unless clearly erroneous, applied to the report of a master appointed in bankruptcy proceedings. In *re Pullmatch* (D. C.-Ohio), 27 Fed. Supp. 884.

The rule as to the weight to be given to the report of a special master was not changed by the new rules. In *re Pullmatch* (D. C.-Ohio), 27 Fed. Supp. 884.

A motion to strike out a report of a special master should be considered as "written objections" to the report. In *re Blakesley* (D. C.-Mo.), 27 Fed. Supp. 980.

589. Order of Reference to Master in a Suit in Equity Before the New Rules.

(Caption.)

This cause being at issue upon the motions of defendants — Railway Company, — Improvement Company, — Trust Company and — Farmers Trust Company to call up and dispose of defenses in point of law arising upon the face of the bill and specified in the amended and

supplemental answers of said defendants, and the defense of laches, res adjudicata, equitable estoppel, bona fide purchaser, and the statute of limitations, and any other defenses formerly presentable by pleas in bar or abatement, made in said amended and supplemental answers, before final hearing of this suit, and

This cause also being at issue upon the motion of said defendants for the appointment of a special master in chancery, and the parties herein having appeared by their solicitors, and the court having heard the parties, and it appearing to the court that the requests to call up and dispose of defenses before final hearing of this suit should be granted and that this is a proper cause for the appointment of a special master,

It is hereby ordered, that —, Esquire, having expressed a willingness to accept such appointment, and the court having full faith and confidence in his ability, integrity, and qualifications, be and he is hereby appointed special master in chancery and he is hereby authorized and directed to hear (1) all pending motions and petitions in this cause, and (2) all defenses in point of law arising upon the face of the bill and specified in the amended and supplemental answers on file herein, and (3) the defenses of laches, res adjudicata, equitable estoppel, bona fide purchaser, the statute of limitations, and any other defenses formerly presentable by pleas in bar or abatement, and specified in the amended and supplemental answers, to take evidence relevant to all said last-enumerated defenses and any necessary and proper evidence relative to the above-mentioned motions, to hear argument on said motions, petitions, and defenses in point of law arising upon the face of the bill and the other defenses specified herein, and to report to the court his findings of fact and conclusions of law and recommendations for orders and decrees on all of said matters, together with such parts of the evidence as any party may request in writing, said findings, conclusions, and recommendations to be subject to review by the court.

It is further ordered, that said special master, after his findings and conclusions and recommendations have been reported to the court and any exceptions thereto have been heard and determined, and decrees or orders on said motions and defenses have been entered by the court, proceed with the final hearing and take the evidence herein and make full and complete findings of fact and conclusions of law and report the same to the court, said findings and conclusions to be subject to review by the court. Said master shall have all the power that may be conferred by this court and as provided by the laws of the United States.

The compensation to be allowed to said master and the expenses incident to this reference shall in the first instance be charged upon and borne equally by the plaintiff and defendant — Railway Company.

It is further ordered, that the plaintiff shall pay the costs including stenographer's fees, of taking its testimony and shall furnish one copy thereof to the defendants without cost; that defendants shall pay like

costs of taking their testimony and shall furnish to plaintiff one copy thereof without cost.

Done this — day of —, 19—.

United States district judge.

590. Master's Oath.

(Caption.)

I, John Doe, having been appointed special master in this action, do solemnly swear that I will faithfully and impartially perform my duties as such master, agreeable to the order of the court, to the best of my ability. So help me God.

John Doe.

Subscribed and sworn to before me this — day of —, 19—.

AB.

Official capacity.

591. Notice Setting Time and Place for Hearing Before Master.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Attorney for defendant.

Address.

Please take notice that a hearing in the above action will be held on
— —, 19—, at — —. M. at —.

Date—.

Master.

Federal Rules of Civil Procedure.

"When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their

attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed

the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment." Rule 53 (d) (1).

NOTE OF ADVISORY COMMITTEE TO RULE 53 (d): "(1) This is substantially a combination of the second sentence of Equity Rule 59 (Reference to Master—

Exceptional, Not Usual) and Equity Rule 60 (Proceedings Before Master). Compare Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

"(2) This is substantially Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

"(3) This is substantially Equity Rule 63 (Form of Accounts Before Master)."

592. Notice of Motion to Continue Hearing Before Master.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that on — —, 19—, at — —. M., plaintiff will move the master herein at — —, for an order continuing the hearing set for — —, 19—, before the special master to — —, 19—, for reasons appearing in the annexed affidavit of — — sworn to on — —, 19—.

Date — —.

Attorney for plaintiff.

Cross-Reference.

In connection with Forms 592, 593, see notes to Form 591.

593. Order Continuing Hearing Before Master.

(Caption.)

On motion of plaintiff it is,

Ordered, that the hearing set for — —, 19—, be and the same is hereby adjourned until — —, 19—, at — —. M., at — —.

Date — —.

Master.

594. Submission of Draft of Master's Report to Counsel.

(Caption.)

To _____
Attorney for plaintiff (defendant).

Address.

Submitted herewith is a draft of my report as master herein appointed by order of this court dated — —, 19—. You are hereby notified that

I shall sign said draft report as my report herein, unless alterations are made by me upon suggestions of counsel and that you may present suggestions as to alterations of or amendments to said draft report, to me at my office at —, on — —, 19—, at — —. M.

Date—.

Master.

Cross-Reference.

Advisory notes to Rule 53 (e), see Form 588.

Federal Rules of Civil Procedure.

"Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions." Rule 53 (e) (5).

595. Master's Report.

(Caption.)

To Honorable —.

Judge of the District Court of the United States
for the — District of —.

Sir:

I have the honor herewith to submit my report as special master appointed by order of this court dated — —, 19—.

I first took the oath hereto annexed; I was attended by the respective parties and having heard the matters referred to me, and taken evidence adduced by the parties, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. _____.
2. _____.
3. _____.

CONCLUSIONS OF LAW

1. _____.
2. _____.
3. _____.

Indorsed filed — —, 19—.

Master.

Cross-References.

See notes to Form 598.

Advisory notes to Rule 53 (e), see Form 588.

Federal Rules of Civil Procedure.

"The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions

of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing." Rule 53 (e) (1).

596. Report of Special Master on Specific Issue.

(Caption.)

To Honorable —.

Judge of the District Court of the United States
for the — District of —.

Sir:

I have the honor herewith to submit my report as special master in this action, appointed by order of this court dated — —, 19—, to take evidence and report the findings of fact and conclusions of law as to whether —.

I first took the oath hereto annexed; I was attended by the attorneys for the respective parties and having heard the matters referred to me, and taken evidence adduced by the parties, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. _____.
2. _____.
3. _____.

CONCLUSIONS OF LAW

1. _____.
2. _____.
3. _____.

Indorsed filed — —, 19—.

Master.**Cross-Reference.**

In connection with Forms 596 to 601,
see notes to Forms 595, 598.

597. Report of Special Master on Accounting.

(Caption.)

To Honorable —.

Judge of the District Court of the United States
for the — District of —.

Sir:

In pursuance of the interlocutory judgment of this court dated — —, 19—, referring this cause to me to ascertain and report to this court the amount of damages that plaintiff has sustained by reason of the infringement of letters patent by the defendant, I have the honor herewith to submit my report as follows:

I first took the oath hereto annexed; I was attended by the attorneys for the respective parties and having heard the matters referred to me and

taken evidence adduced by the parties, I hereby make the following findings of fact and conclusions of law:

1. _____.
2. _____.
3. _____.

Indorsed filed _____, 19—.

Master.

598. Objections to Master's Report.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Please take notice that defendant objects to the report of the master herein filed with the clerk of this court on _____, 19—, in the following particulars:

I

Defendant objects to the master's finding of fact numbered _____ on the ground that it is contrary to the evidence, in that [here cite references to the record].

II

Defendant objects to the master's finding of fact numbered _____ on the ground that it is irrelevant and immaterial to any of the issues.

III

Defendant objects to the master's finding of fact numbered _____ on the ground that it relates to a matter outside of the scope of the order of reference, in that _____.

IV

Defendant objects to the master's report on the ground that it fails to find as follows: [Here insert]. That the foregoing statement is supported by the evidence as follows: [Here cite references to record].

V

Defendant objects to the master's conclusion of law numbered _____ on the ground that it is contrary to law.

Date_____.

Attorney for defendant.

Note.

If the objections are based on evidence claimed to contradict the finding,

they should refer to evidence in the record. *Fordyce v. Omaha, K. C. & E. R. Co.* (C. C.-Mo.), 145 Fed. 544, 557.

Cross-References.

See notes to Form 595.

Advisory notes to Rule 53 (e), see Form 588.

Federal Rules of Civil Procedure.

"In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any

party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." Rule 53 (e) (2).

599. Order Sustaining Objections to Master's Report.

(Caption.)

This action was heard on the report of the special master filed herein on —, 19—, and the objections of the various parties thereto and the court being fully advised, it is

Ordered, that plaintiff's objections numbered —, —, and — and defendant's objections numbered — and — be and the same are hereby sustained; and it is further

Ordered, that each and every other objection of plaintiff and of defendant to said master's report is hereby overruled; and it is further

Ordered, that findings contained in the master's report and numbered — and conclusions of law numbered — are hereby approved and adopted by this court; and it is further

Ordered, that findings contained in the master's report and numbered — and conclusions of law numbered — are hereby disapproved; and it is further

Ordered, that the court hereby make the following additional findings of fact and conclusions of law: —

Date—.

United States district judge.

600. Order Overruling Objections to Master's Report.

(Caption.)

This action was heard upon the report of the special master, filed herein on —, 19—, and the objections of the various parties thereto, and the court being fully advised it is

Ordered, that the objections of plaintiff and of defendant to the report of the special master filed herein on —, 19—, be and they are hereby overruled; and it is further

Ordered, that the report of said special master be and it is hereby confirmed.

Date—.

United States district judge.

601. Notice of Motion to Adopt Master's Report.

(Caption.)

To _____

Attorney for ____.

Address.

Please take notice that on ____ —, 19—, at ____ —. M., plaintiff (defendant) will move this court at ____ for an order overruling defendant's (plaintiff's) objections to the master's report herein filed with the clerk on ____ —, 19—, and adopting said master's report.

Date_____.

Attorney for plaintiff (defendant).**602. Order Allowing Master's Compensation.**

(Caption.)

It is hereby ordered that ____ —, who was on ____ —, 19—, appointed special master in this court by order made and filed on said day, be allowed the sum of ____ dollars (\$____) as compensation for his services to date and that pursuant to the terms of said order of ____ —, 19—, the amount of compensation herein fixed shall be borne equally and paid, one-half each, by the plaintiff and the defendant, ____.

Date_____.

United States district judge.**Cross-Reference.**

Advisory notes to Rule 53 (a), see Form 580.

Federal Rules of Civil Procedure.

"* * * The compensation to be allowed to a master shall be fixed by the

court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. * * *

Rule 53 (a).

CHAPTER 19

JUDGMENTS

Form

- 610. Judgment on motion to dismiss.
- 611. Judgment for plaintiff on verdict.
- 612. Judgment for defendant on verdict.
- 613. Judgment for plaintiff on directed verdict.
- 614. Judgment for defendant on directed verdict.
- 615. Judgment on special verdict.
- 616. Judgment after jury trial involving several defendants.
- 617. Judgments after trial by court.
- 618. Negative covenant in contract for services.
- 619. Negative covenant running with the land.
- 620. To abate a nuisance.
- 621. To enjoin prosecution of suit.
- 622. Enjoining ultra vires transaction.
- 623. In patent case ordering an accounting.
- 624. In action for specific performance.
- 625. In action to remove cloud on title.
- 626. In action to impress a trust.
- 627. In action for declaratory judgment.
- 628. Declaratory judgment in patent suit.
- 629. Action for dissolution of partnership and accounting.
- 630. In action for interpleader.
- 631. Plaintiff awarded costs and execution therefor.
- 632. Judgment for defendant (alternative form).
- 633. Judgment for recovery of money (District of Columbia form).
- 634. Partial judgment.
- 635. Judgment canceling certificate of citizenship.
- 636. Judgment by statutory three-judge court.
- 637. Notice of taxation of costs.

Form

- 638. Motion to review taxation of costs.
- 639. Order reviewing taxation of costs.
- 640. Affidavit for entry of default by clerk.
- 641. Order of default for failure to plead.
- 642. Affidavit for judgment by default by clerk.
- 643. Judgment by default by clerk.
- 644. Notice of application for judgment by default by court.
- 645. Judgment by default by court.
- 646. Notice of motion to set aside a default judgment.
- 647. Order setting aside default and default judgment.
- 648. Notice of motion for summary judgment.
- 649. Order for summary judgment.
- 650. Summary judgment.
- 651. Notice of motion by plaintiff for judgment on the pleadings.
- 652. Notice of motion by defendant for judgment on the pleadings.
- 653. Order denying motion for judgment on the pleadings.
- 654. Order granting motion for judgment on the pleadings.
- 655. Judgment on order granting motion for judgment on pleadings.
- 656. Judgment on the pleadings (Alternative form).
- 657. Motion for new trial—Various grounds alleged.
- 658. Motion for new trial—Newly-discovered evidence.
- 659. Order granting new trial.
- 660. Order overruling motion for new trial.
- 661. Motion to correct judgment.
- 662. Order correcting clerical mistake in judgment.

INTRODUCTION.—The Rules contemplate a simple, succinct form of judgment, not containing any detailed narrative or recital of prior proceedings. Separate judgments may be rendered at various stages of the action disposing of individual claims or counterclaims.

In cases of default, the clerk must first enter the default, on the basis of a showing made by affidavit or otherwise. Thereupon a judgment by default may be entered. Such judgment may be entered by the clerk without any action by the court, in case of a claim for a sum certain or for a sum which can by computation be made certain, provided the party in default is not an infant or an incompetent. In all other cases, application for judgment by default must be made to the court. If the party in default has appeared in the action, he is entitled to three days' notice of such application. Judgments by default may not be entered against an infant or incompetent person unless he is represented by a guardian, committee, conservator, or other representative. While the Soldiers' and Sailors' Civil Relief Act of 1940, approved on Oct. 17, 1940 (Public No. 861, 76th Congress) is in effect, a judgment may not be taken by default against a person in military service, without an order of the court. Such an order may not be made until the court appoints an attorney to protect the absentee's interest.

After a trial, the clerk enters judgment upon the verdict of a jury, except in cases of special verdicts or general verdicts accompanied by interrogatories. In the latter events, the court directs the appropriate judgment to be entered. In nonjury cases, the clerk enters judgment forthwith, if it is to be for a sum of money or that there be no recovery. Otherwise, the court settles or approves the form of judgment.

610. Judgment on Motion to Dismiss.

(Caption.)

This action came on for hearing on defendant's motion to dismiss for lack of jurisdiction over the subject-matter (lack of jurisdiction over the person; failure to state a claim upon which relief can be granted; failure to prosecute; or state other appropriate ground) and the court having granted said motion, it is hereby

Adjudged, that this action be and it hereby is dismissed [on the merits] for [here state ground]; and that the defendant CD recover of plaintiff AB the sum of — dollars (\$—), his costs as taxed and have execution therefor.

Dated—

Clerk.

at—.

Cross-References.

Judgment in Court of Claims, Form 650.

See notes to Forms 640, 648, 661.

Statutory References.

Declaratory judgment, 8 F. C. A., Title 28, § 400; U. S. C. A., Title 28, § 400; id. U. S. C.

Defects in form immaterial, amendment, 8 F. C. A., Title 28, § 777; U. S. C. A., Title 28, § 777; id. U. S. C.

Form of judgment on contractor's bond, 9A, F. C. A., Title 40, § 270; U. S. C. A., Title 40, § 270; id. U. S. C.

General provisions concerning judgments, 8 F. C. A., Title 28, §§ 811 to 836; U. S. C. A., Title 28, §§ 811 to 836; id. U. S. C.

Judgment in suits against United States, 8 F. C. A., Title 28, §§ 252, 253, 256, 287, 764, 901 to 906; U. S. C. A., Title 28, §§ 252, 253, 256, 287, 764, 901 to 906; id. U. S. C.

Judgments for custom duties, 7 F. C. A., Title 28, § 199; U. S. C. A., Title 28, § 199; id. U. S. C.

Judgments in suits under postal laws, 8 F. C. A., Title 28, §§ 782, 788; U. S. C. A., Title 28, §§ 782, 788; id. U. S. C.

Judgments on bonds and debentures issued for collection of custom duties, 8 F. C. A., Title 28, §§ 783 to 789; U. S. C. A., Title 28, §§ 783 to 789; id. U. S. C.

Judgments against persons in military service. Soldiers' and Sailors' Civil Relief Act of 1940, approved Oct. 17, 1940.

Federal Rules of Civil Procedure.

"'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings." Rule 54 (a).

"When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Rule 54 (b).

"A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54 (c).

"The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appro-

priate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Rule 57.

"Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry." Rule 58.

NOTE OF ADVISORY COMMITTEE TO RULE 54 (a): "The second sentence is derived substantially from Equity Rule 71 (Form of Decree)."

NOTE OF ADVISORY COMMITTEE TO RULE 54 (b): "This provides for the separate judgment of equity and code practice. See Wis. Stat. (1935) § 270.54; Compare N. Y. C. P. A. (1937) § 476."

NOTE OF ADVISORY COMMITTEE TO RULE 54 (c): "For the limitation on default contained in the first sentence, see 2 N. D. Comp. Laws Ann. (1913) § 7680; N. Y. C. P. A. (1937) § 479. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 13, r. r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.)."

NOTE OF ADVISORY COMMITTEE TO RULE 57: "The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will 'terminate the controversy' giving rise to the pro-

ceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ. Proc. (Deering, 1937) § 1062a), Michigan (3 Comp. Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ. Pract. § 639a-3).

"The 'controversy' must necessarily be 'of a justiciable nature thus excluding an advisory decree upon a hypothetical state of facts.' *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. ed. 688, 699 (1936). The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

"When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may sua sponte,

if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring v. Koepke*, 263 Mich. 466 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the federal act. Compare *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249 (1933); *Gully, Tax Collector v. Interstate Natural Gas Co.*, 82 Fed. (2d) 145 (C. C. A. 5th, 1936); *Ohio Casualty Ins. Co. v. Plummer*, 13 F. Supp. 169 (S. D. Tex., 1935); *Borchard, Declaratory Judgments* (1934), *passim*."

NOTE OF ADVISORY COMMITTEE TO RULE 58: "See Wis. Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) § 7-1101, and 4 Mont. Rev. Codes Ann. (1935) § 9403, which provide that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn. Practice Book (1934) § 200, provides that all judgments shall be entered within one week after rendition. In some states such as Washington, 2 Rev. Stat. Ann. (Remington, 1932) § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (*ibid.*), provides that all judgments shall be entered by the clerk, subject to the court's direction."

NOTES TO DECISIONS

Declaratory Judgments [Rule 57].

A person charged with infringing a patent brought suit for declaratory judgment to declare the patent invalid. During the pendency of an appeal from a decree dismissing the bill, which was rendered prior to the effective date of the new rules, the owner of the patent brought an infringement suit against the plaintiff in a declaratory judgment suit. The institution of infringement suit does

not constitute ground for affirmance of decree. *Bliss Co. v. Cold Metal Process Co.* (C. C. A. 6), 102 Fed. (2d) 105, 41 U. S. P. Q. 342.

In an action for declaratory judgment to establish noninfringement by plaintiff of defendant's patent, judgment on the pleadings should not be granted if there is a genuine issue as to the existence of an actual controversy as a basis for declaratory relief. *Caterpillar Trac-*

tor Co. v. International Harvester Co. (C. C. A. 9), 106 Fed. (2d) 769.

An action by a liability insurance company for declaratory judgment against its insured and a person claiming damages for injuries resulting from negligent operation of an automobile by insured is triable by jury as of right. Pacific Indem. Co. v. McDonald (C. C. A. 9), 107 Fed. (2d) 446.

Whether or not an action for declaratory relief is triable by jury depends on whether it would have been so triable if it had been brought at common law or in equity. Pacific Indem. Co. v. McDonald (C. C. A. 9), 107 Fed. (2d) 446.

A party claiming damages for negligence against an insured person may not be deprived of his right to a jury trial by the bringing of an action by the insurer for declaratory relief. Pacific Indem. Co. v. McDonald (C. C. A. 9), 107 Fed. (2d) 446.

An action for a declaratory judgment which concerns the duty of a contract obligor to pay money on the fulfillment of a condition is triable by jury as of right, and this principle is applicable if the action seeks to adjudicate the liability of an insurance company on one of its policies. (American) Lumbermens Mut. Casualty Co. v. Timms & Howard, Inc. (C. C. A. 2), 108 Fed. (2d) 497.

The parties in a jury-waived action may agree to submission of the case to an advisory jury. (American) Lumbermens Mut. Casualty Co. v. Timms & Howard, Inc. (C. C. A. 2), 108 Fed. (2d) 497.

Action to recover damages caused by automobile collision was brought in state court. Insurance company which insured defendant in that action against liability, brought suit in federal court for a declaratory judgment adjudicating that it was not liable because of breach of policy by insured. The pendency of action in state court did not bar the action for declaratory judgment. Pacific Indem. Co. v. McDonald (D. C.-Ore.), 25 Fed. Supp. 522.

An insurance company, which was defending a negligence suit brought in state court against a person for whom it carried liability insurance, filed action in federal court for declaratory judgment adjudicating its nonliability on policy. The defendant's motion to dismiss the complaint on the ground of pendency of prior action was tentatively

denied. Ohio Casualty Ins. Co. v. Richards (D. C.-Ore.), 27 Fed. Supp. 18.

A liability insurance company claiming that because of failure to give it notice of the accident, it was not liable in respect to an accident involving its insured, brought suit in a federal court to secure a declaratory judgment. Previously suit for damages had been brought against the estate of the insured by the administrators of persons killed in the accident. Action in state court should be prosecuted first, since the action in the federal court presented an additional question that would not have to be determined if plaintiffs in state court did not prevail. General Acc. Fire & Life Assurance Corp., Ltd. v. Morgan (D. C.-N. Y.), 30 Fed. Supp. 753.

The complaint in an action for declaratory relief should be dismissed for insufficiency if it does not present a justiciable controversy. Duart Mfrg. Co., Ltd. v. Philad Co. (D. C.-Del.), 30 Fed. Supp. 777.

In the exercise of discretion, the court declined to take jurisdiction of an action for a declaratory judgment brought against a fictitious person. Wilder v. Doe (D. C.-Pa.), 30 Fed. Supp. 869.

An employer's liability insurance company brought an action against the insured employer and an employee of the latter who had filed suit in the state court against the insured, seeking a declaratory judgment as to the insurer's liability under the policy and an injunction to restrain further prosecution of the action in the state court, in which insurer had undertaken the defense in compliance with the terms of its policy but with reservations as to its further liability. Action for declaratory judgment should be dismissed since no actual controversy existed. Maryland Casualty Co. v. Tindall (D. C.-Mo.), 30 Fed. Supp. 949.

Defendant, in an action for declaratory judgment as to validity and infringement of a patent and for unfair competition, may counterclaim for damages for infringement of the patent. Myers v. Beckman (D. C.-Okla.), 1 Fed. R. Dec. 99.

An insurance company suing an annuitant for a declaratory judgment to determine its right to retain premiums paid for the annuity may join an alleged heir of the annuitant who has challenged the validity of the annuity contract, as

a party defendant. *Mutual Life Ins. Co. v. Benton* (D. C.-Mo.), 1 Fed. R. Dec. 151.

Requirements with respect to joinder of parties apply to actions for declaratory judgments equally with actions to recover money or specific property. *Mutual Life Ins. Co. v. Benton* (D. C.-Mo.), 1 Fed. R. Dec. 151; *Norton v. United Gas Corp.* (D. C.-La.), 1 Fed. R. Dec. 155.

In actions for declaratory relief, parties need not be joined merely because they have an interest in the subject-matter of the litigation. *Norton v. United Gas Corp.* (D. C.-La.), 1 Fed. R. Dec. 155.

In an action for declaratory judgment to determine the rights of the lessor under mineral leases, lessor's assignees of other rights in the leases are not indispensable parties and need not be joined if to do so would deprive the court of jurisdiction of the parties already before it. *Norton v. United Gas Corp.* (D. C.-La.), 1 Fed. R. Dec. 155.

In an action for wrongful death resulting from an airplane accident, the defendant operating company is not entitled to maintain a cross-claim for a declaratory judgment establishing its right to indemnity from its codefendant, manufacturer of the plane, in respect to death claims of other persons than the plaintiff. *Lewis v. United Air Lines Transport Corp.* (D. C.-Conn.), 48 Bull. 26.

Definition; Form [Rule 54 (a)].

A judgment in a civil action which would have been a suit in equity under the old procedure must comply with Equity Rule 71. *Tri-Plex Shoe Co. v. Cantor* (D. C.-Pa.), 27 Fed. Supp. 295.

Demand for Judgment [Rule 54 (c)].

Whether the plaintiff is entitled to the specific relief for which he asks will not be considered on a motion to dismiss the complaint for insufficiency. *Catanzaritti v. Bianco* (D. C.-Pa.), 25 Fed. Supp. 457; *Gay v. Moore* (D. C.-Okla.), 26 Fed. Supp. 749; *Commonwealth Trust Co. v. Reconstruction Finance Corp.* (D. C.-Pa.), 28 Fed. Supp. 586.

Demurrer filed prior to the effective date of the rules attacking the suffi-

ciency of petition should be treated as a motion to dismiss for failure to state a claim. *Gay v. Moore* (D. C.-Okla.), 26 Fed. Supp. 749.

The Federal Rules of Civil Procedure should be applied to removed actions pending on the effective date of the rules, unless their application would not be feasible or would work an injustice. *Gay v. Moore* (D. C.-Okla.), 26 Fed. Supp. 749.

Entry of Judgment [Rule 58].

Entry of judgment upon a verdict may be withheld pending disposition of a motion to dismiss made at the close of the evidence on which the court reserved decision and a motion for a new trial made after return of the verdict. *Voelker v. Delaware, L. & Western R. Co.* (D. C.-N. Y.), 31 Fed. Supp. 515.

The New York rule that interest on judgments runs from the date of the verdict rather than from the date of the judgment obtains in the federal courts in New York. *Voelker v. Delaware, L. & Western R. Co.* (D. C.-N. Y.), 31 Fed. Supp. 515.

A judgment for the defendant in a patent case in which plaintiff has failed to prove infringement should be simply a dismissal of the action with prejudice. *Buettner v. Hansen* (D. C.-Md.), 1 Fed. R. Dec. 59.

Judgment at Various Stages [Rule 54 (b)].

A judgment finally disposing of one claim for relief is appealable even though other claims remain undisposed of. *Bowles v. Commercial Casualty Ins. Co.* (C. C. A. 4), 107 Fed. (2d) 169.

In an action for infringement of two separate patents, an order dismissing the complaint as to one of them is a final decision and is, therefore, appealable. *Karl Kiefer Mach. Co. v. United States Bottlers Machinery Co.* (C. C. A. 7), 108 Fed. (2d) 469.

An amendment to a complaint in order to pray for alternative relief is not indispensable. *Borton v. Connecticut General Life Ins. Co.* (D. C.-Nebr.), 25 Fed. Supp. 579.

611. Judgment for Plaintiff on Verdict.

(Caption.)

JUDGMENT

This action came on to be tried before the court and jury, and the jury having rendered a verdict for the plaintiff in the sum of — dollars (\$—), it is hereby

Adjudged, that the plaintiff AB recover of the defendant CD the sum of — dollars (\$—), with costs in the sum of — dollars (\$—), aggregating the sum of — dollars (\$—), and that the plaintiff have execution therefor.

Dated—
at—.

Clerk.**Cross-Reference.**

In connection with Forms 611 to 616,
see notes to Form 610.

612. Judgment for Defendant on Verdict.

(Caption.)

JUDGMENT

This action came on to be tried before the court and jury, and the jury having rendered a verdict for the defendant, it is hereby

Adjudged, that this action be and it hereby is dismissed on the merits, and that the defendant CD recover of plaintiff AB the sum of — dollars (\$—), his costs as taxed and have execution therefor.

Dated—
at—.

Clerk.**613. Judgment for Plaintiff on Directed Verdict.**

(Caption.)

JUDGMENT

This action came on to be tried before the court and jury, and the court having directed a verdict for the plaintiff in the sum of — dollars (\$—), it is hereby

Adjudged, that the plaintiff AB recover of the defendant CD the sum of — dollars (\$—), with costs in the sum of — dollars (\$—), aggregating the sum of — dollars (\$—), and that the plaintiff have execution therefor.

Dated—
at—.

Clerk.

614. Judgment for Defendant on Directed Verdict.

(Caption.)

JUDGMENT

This action came on to be tried before the court and jury, and the court having directed a verdict for the defendant, it is hereby

Adjudged, that this action be and it hereby is dismissed on the merits, and that the defendant CD recover of plaintiff AB the sum of — dollars (\$—), his costs as taxed and have execution thereof.

Dated—
at—.

Clerk.

615. Judgment on Special Verdict.

(Caption.)

JUDGMENT

This cause came on to be tried before the court and jury, and the jury having rendered a special verdict as follows: [Here insert text of special verdict] and the court having directed that judgment be entered on said verdict in favor of the plaintiff for the sum of — dollars (\$—) (in favor of the defendant dismissing the action on the merits) it is hereby

Adjudged, that the plaintiff AB recover of the defendant CD the sum of — dollars (\$—), with costs in the sum of — dollars (\$—), aggregating the sum of — dollars (\$—), and that the plaintiff have execution therefor,

OR

Adjudged, that this action be and it hereby is dismissed on the merits; and that the defendant CD recover of plaintiff AB the sum of — dollars (\$—), his costs as taxed and have execution therefor.

Dated—
at—.

United States district judge.

616. Judgment After Jury Trial Involving Several Defendants.

(Caption.)

JUDGMENT

This action came on to be tried before the court and jury, and the court having directed a verdict for the defendant CD and the jury having rendered a verdict in favor of the plaintiff for the sum of — dollars (\$—) against the defendant EF, and for the sum of — dollars (\$—), in favor of the defendant EF against the third party defendant GH, it is hereby

Adjudged, that this action be and it hereby is dismissed on the merits as against the defendant CD, and that the defendant CD recover of plaintiff AB the sum of — dollars (\$—) his costs as taxed and have execution therefor; and it is further

Adjudged, that the plaintiff AB recover of the defendant EF the sum of — dollars (\$—), with costs in the sum of — dollars (\$—), aggregating the sum of — dollars (\$—), and that the plaintiff have execution therefor; and it is further

Adjudged, that defendant EF recover of the third party defendant GH the sum of — dollars (\$—), with costs in the sum of — dollars (\$—), aggregating the sum of — dollars (\$—), and that the defendant EF have execution therefor.

Dated—
at—.

Clerk.

617. Judgments After Trial by Court.

(Caption.)

JUDGMENT

This action came on to be tried before the court, and the evidence adduced by the parties having been heard, and the court having made its findings of fact and conclusions of law, it is hereby

Adjudged, that this action be and it hereby is dismissed on the merits; and that the defendant CD recover of plaintiff AB the sum of — dollars (\$—), his costs as taxed and have execution therefor.

618. Negative Covenant in Contract for Services.

Adjudged, that defendant AB be and he is hereby restrained and enjoined from singing or performing or participating in any musical or theatrical performance at any public place until — —, 19—, except at the place or places and on the occasion referred to in the contract for services between plaintiff and defendant, dated — —, 19—.

619. Negative Covenant Running with the Land.

Adjudged that defendant AB, his agents and servants be and they are hereby restrained and enjoined from maintaining, conducting, or operating on the premises described as — any business, industrial or commercial establishment whatsoever, or permitting any other person to maintain, conduct, or operate the same, or from using the said premises for any purpose whatsoever except as a dwelling-house.

620. To Abate a Nuisance.

Adjudged, that defendant, his agents and servants be and they are hereby restrained and enjoined from maintaining a slaughter-house on the premises described as — or permitting the said premises to be used for such purpose.

621. To Enjoin Prosecution of Suit.

Adjudged, that the defendant, his agents and servants be and they are hereby restrained and enjoined from prosecuting or taking any further steps in the action entitled "AB, Plaintiff, against CD, Defendant" and pending in — Court, or from commencing and instituting any other proceeding on the claim for relief referred to in the complaint in said action.

622. Enjoining Ultra Vires Transaction.

Adjudged, that defendant, XY Corporation, and the defendants, AB, CD, and EF, their agents and servants be and they are hereby restrained and enjoined from continuing to perform the contract [here insert description sufficient to identify the contract], and from using or permitting the use of any funds or other assets of the said XY Corporation for or in connection therewith.

623. In Patent Case Ordering an Accounting.

Adjudged as follows:

1. That letters patent of the United States issued to — and No. —, dated —, 19—, are valid.
2. That plaintiff is the sole exclusive owner of said letters patent.
3. That defendant has infringed said letters patent.
4. That defendant, his agents and servants be and they are hereby restrained and enjoined from manufacturing, using, or selling any [here name type of article or device], embodying the invention or inventions claimed in said letters patent.
5. That this action be and it is hereby referred to — as special master to take evidence and ascertain the amount of damages sustained by plaintiff by reason of the said infringement by defendant and report the same to this court without delay.

624. In Action for Specific Performance.

Adjudged that the defendant CD be and he hereby is directed, within — days from the date hereof, to grant and convey to plaintiff AB, his heirs and assigns, all his right, title, and interest to certain real property bounded and described as follows: [Here insert description], provided

that the plaintiff pay to the defendant the sum of — dollars (\$—), as the purchase-price of said property.

625. In Action to Remove Cloud on Title.

Adjudged, that the defendant CD be and he hereby is directed, within — days from the date hereof, to deliver to the clerk of this court for cancelation the following described instrument, to wit: [Here insert].

626. In Action to Impress a Trust.

Adjudged, the defendant CD holds the following described property, to wit: [Here insert], as trustee for plaintiff AB and that he is hereby directed within — days from the date hereof, to execute a conveyance of the same to said plaintiff.

627. In Action for Declaratory Judgment.

Adjudged, that the promissory note dated — —, 19—, and bearing the signature of defendant CD, whereby the said defendant promised and agreed to pay the sum of — dollars (\$—) on — —, 19—, to the order of plaintiff AB, is a valid and binding obligation of said defendant.

628. Declaratory Judgment in Patent Suit.

Adjudged, that letters patent of the United States numbered —, issued to — on — —, 19—, are valid (or invalid as having been anticipated by prior art or as not covering a patentable invention, etc.) and have (not) been infringed by plaintiff (defendant).

629. Action for Dissolution of Partnership and Accounting.

Adjudged, that the partnership between plaintiff AB and defendant CD be and the same is hereby dissolved; and that an account be stated as to the partnership assets and that the said defendant be required to account to the plaintiff for one-half of the assets of said partnership; and it is further

Adjudged, that this action be and it is hereby referred to —, as special master to take and state the account as aforesaid and to report the same to the court.

630. In Action for Interpleader.

Ordered and adjudged as follows:

1. That complainant, — Waterworks and Electric Company, Inc., shall pay into the registry of this court the sum of — dollars (\$—), that being the amount of the dividends which have accrued and become payable since — —, 19—, upon the — shares of common stock and

— shares of — series first preferred stock of said complainant, which are referred to in the complaint in this case; and shall also file with the clerk of this court its bond, conditioned that it will retain all such dividends as may hereafter be declared and become payable upon the shares of stock, aforesaid, until the entry of the final decree in this case, to such person as this court shall find in such final decree to be entitled thereto.

2. That defendant, — Trust Company, as executor of the alleged last will and testament of GP, dated June 12, 1929, and admitted to probate in the office of the register of wills of — County, and defendants, The — National Bank of — and RW, as executors of the alleged last will and testament of GP, dated August 22, 1933, and admitted to probate in the — Court of — County, —, each of them be, and hereby they are, enjoined and restrained from entering any suit or taking any other action against the complainants, or any of them, based upon or by virtue of the issuance of the stock certificates described in the complaint in this case; or to recover any of the dividends which have accrued and become payable, or which may accrue or become payable, upon any of said shares of stock at any time since the death of the said GP.

3. That defendant, — Trust Company, as executor of the said alleged last will and testament of GP, dated June 12, 1929, interplead with defendants, The — National Bank of — and RW, as executors of said alleged last will and testament of said GP, dated August 22, 1933, in an interpleader proceeding in which this court shall determine and settle the rights or claims of the defendants, aforesaid, to the shares of stock and the certificates representing them and to the dividends which form the subject-matter of this suit.

4. That defendant, — Trust Company, executor, shall be the plaintiff, and the defendants, The — National Bank of Jacksonville and RW, as executors, as aforesaid, shall be the defendants in said interpleader; that within — days from the date of this decree, said — Trust Company, as plaintiff in such interpleader, shall file in this court and serve upon counsel for the other parties to this case, either a new complaint stating its claim or claims to the shares of stock and the dividends, aforesaid, or else a written declaration declaring its intention that its answer, heretofore filed in this case, shall stand as its complaint to said shares and said dividends.

5. That within — days after the service upon them or their counsel of such new complaint or such written declaration, the said The — National Bank of — and RW, as executors as aforesaid, as defendants in said interpleader, shall file in this case and serve upon counsel for the other parties to this case, either a written answer to the complaint so filed by said — Trust Company, as executor, or (as the case may be) to the answer of the said — Trust Company, as executor, heretofore filed in this case, or else a written declaration declaring their intention that their answer heretofore filed in this case shall stand as their answer to said shares of stock and said dividends.

6. That the order of injunction heretofore issued in this case shall continue and remain in full force and effect as against the said — Trust Company and as against said The — National Bank of — and RW, as executors under said instrument dated August 22, 1933, until the final disposition of this case, or until further order of the court.

7. That the defendants, The — National Bank of — and RW, individually, be and they are hereby dismissed and discharged as parties defendant to this suit, and the complaint, as amended, is dismissed as to said defendants as individuals.

8. The determination of what counsel fees and costs, if any, plaintiffs are entitled to out of the shares of stock, dividends, monies, and matters here in dispute, is reserved until the matters involved in the interpleader proceedings are disposed of.

United States district judge.

Date_____.

631. Plaintiff Awarded Costs and Execution Therefor.

Adjudged, that the plaintiff AB recover of the defendant CD the sum of — dollars (\$——) as costs, and have execution therefor.

United States district judge.

Date_____.

Cross-Reference.

In connection with Forms 631 to 636,
see notes to Form 610.

632. Judgment for Defendant (Alternative Form).

(Caption.)

This action came on for trial; the evidence and arguments of counsel having been heard; special questions having been submitted to the jury and having been answered by the jury; the pleadings, the evidence, the arguments of counsel, and the jury's answers to special questions having been duly and fully considered and the court being fully advised in the premises, the defendant's motion for judgment is sustained, and it is

Ordered, adjudged, and decreed, that plaintiff have and recover nothing from defendant and that the costs be assessed against plaintiff. Exceptions allowed to plaintiff.

United States district judge.

Date_____.

633. Judgment for Recovery of Money (District of Columbia Form).

(Caption.)

This action came on to be heard (or to be further heard, as the case may be) at this term; and thereupon upon consideration thereof, it is, this — day of —, 19—, adjudged that the plaintiff (defendant) recover against the defendant (plaintiff) — dollars (\$—) [when interest is recoverable, add: "with interest at the rate of — per cent. (—%) per annum from the — day of —, 19—,"] being the money payable by him to the plaintiff (defendant) by reason of the premises, and his costs of action.

Date—.

Source of Form.

Form prescribed by Rule 40 of the Rules of the United States District Court for the District of Columbia.

634. Partial Judgment.

(Caption.)

This action came on for trial by the court as to the issues arising on the first claim for relief pleaded in the complaint, and the action having proceeded as to the second claim for relief, and the court having made its findings of fact and conclusions of law as to the first claim for relief, it is hereby

Adjudged, that the plaintiff recover of the defendant on the first claim for relief pleaded in the complaint the sum of — dollars (\$—), and costs in the sum of — dollars (\$—), amounting in the aggregate to the sum of — dollars (\$—); and that the plaintiff have execution therefor.

United States district judge.

Date—.

635. Judgment Canceling Certificate of Citizenship.

(Caption.)

This cause was heard on complaint of the United States to cancel the certificate of citizenship heretofore issued to —, defendant herein, and defendant's consent to the entry of a judgment canceling the certificate of citizenship and his waiver of further notice with respect thereto being attached hereto, and the court being fully advised in the premises, it is

Adjudged, that the final order entered by the United States District Court for the — District of —, at —, —, on the — day of —, 19—, admitting defendant as a citizen of the United States of America, be

and the same is hereby vacated; and that the certificate of citizenship issued by virtue of said order on the — day of —, 19—, be and the same is hereby set aside; and it is further adjudged that the defendant be and he is hereby ordered to surrender to the clerk of this court the certified copy of the said certificate of citizenship which was delivered to defendant; and it is further

Adjudged, that the defendant be and he is hereby forever restrained and enjoined from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under said order admitting defendant to citizenship or the certificate of citizenship issued by virtue of said order.

United States district judge.

Date—.

636. Judgment by Statutory Three-Judge Court.

District Court of the United States

_____ District of _____

_____ Division

— Terminals Company, a corporation,
Plaintiff,

v.

AL, SL, OH, TF, BD, Members of
the Board of Police Commissioners
of the city of —, and JG, Chief of
Police of the city of —, and Pub-
lic Service Commission of the State
of —,

Defendants.)

Civil No. —

ORDER AND JUDGMENT

This cause having been duly and properly submitted to this legally convened statutory three-judge court upon plaintiff's motion for a temporary injunction and defendant's motion to dismiss, and the cause having been taken under advisement by the court, and now the court being fully advised in the premises and having filed and entered of record its opinion, findings of fact, and formal conclusions of law, separately stated,

It is ordered, adjudged, and decreed that plaintiff's complaint be dismissed with prejudice, for want of any jurisdiction of this court because of the absence of any substantial federal question;

That the temporary restraining order heretofore entered be and is hereby vacated and set aside;

That defendants' motion for leave to file counterclaim be and is hereby denied;

That the defendants be and are hereby discharged with their costs.

United States circuit judge.

United States district judge.

United States district judge.

Dated this ____ day of ____, 19__, at ____, ____.

637. Notice of Taxation of Costs.

(Caption.)

To _____

Attorney for plaintiff (defendant).

Address.

Please take notice that the annexed bill of costs in this action will be presented to the clerk for taxation at his office at ____ at ____ M. on ____ ____, 19__.

Attorney for plaintiff (defendant).

Date ____.

Address.

Note.

Costs may be taxed by the clerk on one day's notice, Federal Rules of Civil Procedure, Rule 54 (d).

Statutory Reference.

Costs as part of judgment, 8 F. C. A., Title 28, § 830; U. S. C. A., Title 28, § 830; id. U. S. C.

Federal Rules of Civil Procedure.

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." Rule 54 (d).

NOTE OF ADVISORY COMMITTEE TO RULE 54 (d): "For the present rule in com-

mon law actions, see *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920); *Payne*, Costs in Common Law Actions in the Federal Courts (1935), 21 Va. L. Rev. 397.

"The provisions as to costs in actions in forma pauperis contained in U. S. C., Title 28, §§ 832-836 are unaffected by this rule. Other sections of U. S. C., Title 28, which are unaffected by this rule are: §§ 815 (Costs; plaintiff not entitled to, when), 821 (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 (Costs; attorney liable for, when), and 830 (Costs; bill of; taxation).

"The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

"U. S. C., Title 15, §§ 77v (a), 78aa, 79y (Securities and Exchange Commission)

U. S. C., Title 16, § 825p (Federal Power Commission)

U. S. C., Title 26, §§ 1569 (d) and

- 1645 (d) (Internal revenue actions)
 U. S. C., Title 26, § 1670 (b) (2) (Reimbursement of costs of recovery against revenue officers)
 U. S. C., Title 28, § 817 (Internal revenue actions)
 U. S. C., Title 28, § 836 (United States—actions in forma pauperis)
 U. S. C., Title 28, § 842 (Actions against revenue officers)
 U. S. C., Title 28, § 870 (United States—in certain cases)
 U. S. C., Title 28, § 906 (United States—foreclosure actions)
 U. S. C., Title 47, § 401 (Communications Commission)
 “The provisions of the following and similar statutes as to costs are unaffected:
 “U. S. C., Title 7, § 210 (f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)
 U. S. C., Title 7, § 499g (c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)
 U. S. C., Title 8, § 45 (Action against district attorneys in certain cases)
 U. S. C., Title 15, § 15 (Actions for injuries due to violation of anti-trust laws)
 U. S. C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)
 U. S. C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)
 U. S. C., Title 15, § 78i (e) (Certain actions under the Securities Exchange Act of 1934)
 U. S. C., Title 15, § 78r (Similar to 78i (e))
 U. S. C., Title 15, § 96 (Infringement of trade-mark—damages)
 U. S. C., Title 15, § 99 (Infringement of trade-mark—injunctions)
 U. S. C., Title 15, § 124 (Infringement of trade-mark—damages)
 U. S. C., Title 19, § 274 (Certain actions under customs law)
 U. S. C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)
 U. S. C., Title 31, §§ 232 and 234 (Action for making false claims upon United States)
 U. S. C., Title 33, § 926 (Actions under Harbor Workers’ Compensation Act)
 U. S. C., Title 35, § 67 (Infringement of patent—damages)
 U. S. C., Title 35, § 69 (Infringement of patent—pleading and proof)
 U. S. C., Title 35, § 71 (Infringement of patent—when specification too broad)
 U. S. C., Title 45, § 153p (Actions for non-compliance with an order of National R. R. Adjustment Board for payment of money)
 U. S. C., Title 46, § 38 (Action for penalty for failure to register vessel)
 U. S. C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)
 U. S. C., Title 46, § 941 (Certain actions under Ship Mortgage Act)
 U. S. C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)
 U. S. C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)
 U. S. C., Title 49, § 16 (2) (Action based on non-compliance with an order of I. C. C. for payment of money)”

NOTES TO DECISIONS

In General.

Costs may be imposed against the Reconstruction Finance Corporation. *Reconstruction Finance Corp. v. J. G. Menihan Corp.* (C. C. A. 2), 111 Fed. (2d) 940.

In a patent suit which was tried and in which the mandate on appeal was filed before September 16, 1938, the allowance

of costs should be governed by the old rules which made such allowance discretionary, rather than by Rule 54 (d) in view of the fact that the court expresses doubt as to whether the latter rule makes the imposition of costs mandatory or discretionary. *Johnson Metal Products Co. v. Lundell-Eckberg Mfg. Co.* (D. C. N. Y.), 25 Fed. Supp. 937.

A motion to review the taxing of costs by the clerk was filed one day after the expiration of the specified period. In the absence of a reasonable excuse for the delinquency, the motion should be dismissed. *United States v. One Ford Coupe* (D. C.-Pa.), 26 Fed. Supp. 598.

Costs may be awarded in favor of an officer of the United States. *Solomon v. Welch* (D. C.-Cal.), 28 Fed. Supp. 823.

In an action in which the mandate of the circuit court of appeals was filed in the District Court and judgment pursuant thereto entered after the effective date of the rules, such rules, in so far as they relate to costs, are controlling. *Solomon v. Welch* (D. C.-Cal.), 28 Fed. Supp. 823.

In an action under the Tucker Act (8 F. C. A., Title 28, §§ 762 to 764; U. S. C. A., Title 28, §§ 762 to 764; id. U. S. C.) in which the government is the prevailing party, the clerk should tax as costs the attorney's docket fee but not the fee for filing answer or the fee for acknowledging defendant's cost bill, since the two last-mentioned fees were not paid to the clerk within the meaning

of section 15 of the Tucker Act, which permits allowance as costs of expenses actually incurred and fees paid to the clerk. *Asher v. United States* (D. C.-Cal.), 28 Fed. Supp. 893.

An action against a collector of internal revenue for a refund of taxes is not deemed a suit against the government, unless a certificate of probable cause is given, and hence, costs are taxable in such an action. *Mellon v. Heiner* (D. C.-Pa.), 30 Fed. Supp. 948.

When a motion to quash service of process is referred to a special master and the adverse party incurs expenses in producing witnesses as a result of such reference, if the moving party subsequently abandons his motion, the adverse party is entitled to immediate reimbursement for such expenses, without awaiting the outcome of the action. *Lazar v. Cecelia Co.* (D. C.-N. Y.), 32 Fed. Supp. 420.

The expense incurred by the prevailing party in the taking of necessary depositions may be taxed as costs. *Schmitt v. Continental-Diamond Fibre Co.* (D. C.-Ill.), 1 Fed. R. Dec. 109.

638. Motion to Review Taxation of Costs.

(Caption.)

To _____

Attorney for defendant (plaintiff).

Address.

Please take notice that on ———, 19—, at ———. M., plaintiff (defendant) will move this court at ——— to retax the costs in this action taxed by the clerk on ———, 19—, by striking out the following items: (by adding thereto the following items:)

1. ———.
2. ———.
3. ———.

Attorney for plaintiff (defendant).

Date——.

Cross-Reference.

See notes to Forms 637, 661.

639. Order Reviewing Taxation of Costs.

(Caption.)

This action was heard on motion of plaintiff (defendant) to review the taxation of costs herein, and the court being advised, it is

Ordered, that the bill of costs taxed herein on ———, 19——, be and it is hereby amended by striking therefrom the following items: (by adding thereto the following items:)

1. ———.
2. ———.
3. ———.

Date——.

United States district judge.**Cross-Reference.**

See notes to Forms 610, 637, 661.

640. Affidavit for Entry of Default by Clerk.

STATE OF ———, }
COUNTY OF ———. } ss:

I, AB, attorney for plaintiff being duly sworn say:

The summons and complaint in this action were duly served on defendant on ———, 19——, as more fully appears from the affidavit of service filed herein, verified by ——— on ———, 19—— (or the return of the marshal herein, as the case may be). The time of said defendant to plead or otherwise defend expired on ———, 19——. Defendant failed to plead or otherwise defend within such time. The defendant is not in military service. [Add details on which this statement is based.]

AB.

Attorney for plaintiff.

Subscribed and sworn to before me this ——— day of ———, 19——.

Official character.**Note.**

Allegation concerning military service is required by § 200 (1) of the Soldiers' and Sailors' Civil Relief Act of 1940, approved Oct. 17, 1940, 54 Stat., ch. 888.

Cross-Reference.

See notes to Forms 610, 661.

Federal Rules of Civil Procedure.

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." Rule 55 (a).

"Judgment by default may be entered as follows:

"When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

"In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against

whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States." (Rule 55 (b)).

NOTE OF ADVISORY COMMITTEE TO RULE 55 (a): "This represents the joining of the equity decree pro confesso (Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree Pro Confesso), 17 (Decree Pro Confesso to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue))

and the judgment by default now governed by U. S. C., Title 28, § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 41 (b).

"The provision for the entry of default comes from the Massachusetts practice, 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn. Stat. (Mason, 1927) § 9256."

NOTE OF ADVISORY COMMITTEE TO RULE 55 (b): "The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N. Y. C. P. A. (1937) § 485, in Calif. Code Civ. Proc. (Deering, 1937) § 585 (1), and in Conn. Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif. Code, supra, § 585 (2); N. Y. C. P. A. (1937) § 490; 2 Minn. Stat. (Mason, 1927) § 9256 (3); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 411 (2). U. S. C., Title 28, § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2)."

NOTES TO DECISIONS

In General.

Default judgment should not be entered against a party who has appeared in the action unless he has been served with notice of the application for judgment at least three days prior to the hearing, although the motion for judgment was filed before the new rules became effective. *Hoffman v. New Jersey Federation of Hebrew Assns.* (C. C. A. 3), 106 Fed. (2d) 204.

Filing of a demurrer prior to the effective date of the rules constitutes an appearance and thereafter default judgment may be obtained only upon application to the court and notice. *Missouri ex rel. De Vault v. Fidelity & Casualty Co.* (C. C. A. 8), 107 Fed. (2d) 343.

Although under this rule a default should be entered by the clerk without

an application to the court, the rule is not a limitation, and the court, having the power, will grant the motion and enter the default. *United States v. Jackson* (D. C.-Ore.), 25 Fed. Supp. 79.

Judgment on the pleadings will not be granted where answer was sent to clerk but not filed for lack of filing fee, and defendant later advised clerk that he did not wish to contest petition, but entry of default may be had on proper application. *Interstate Commerce Comm. v. Daley* (D. C.-Mass.), 26 Fed. Supp. 421.

During the pendency of a motion to quash service of summons as to one of two claims for relief, plaintiff's motion for judgment by default as to the other claim should be denied, even though time to answer has expired. *Kohloff v. Ford Motor Co.* (D. C.-N. Y.), 27 Fed. Supp. 803.

641. Order of Default for Failure to Plead.

(Caption.)

It appearing from the affidavit of ——— verified on ———, 19——, that the summons and complaint in this action were duly served on defendant

on ———, 19—, that the time of said defendant to plead or otherwise defend expired on ———, 19—, and that defendant has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure, it is

Ordered, that the default of the defendant be and it is hereby entered.

Clerk.

Date——.

Cross-Reference.

In connection with Forms 641 to 645,
see notes to Form 640.

Statutory Reference.

Judgments against persons in military service. Soldiers' and Sailors' Civil Relief Act of 1940, approved Oct. 17, 1940, 54 Stat., ch. 888.

642. Affidavit for Judgment by Default by Clerk.

(Caption.)

STATE OF ———, }
COUNTY OF ———. } ss:

John Doe, being duly sworn says:

1. That he is the plaintiff in this action.
2. That he is the owner of the premises at ——— referred to and more fully described in the complaint herein.
3. That on ———, 19—, he and the defendant executed a written lease whereby he agreed to lease said premises to defendant for a period of ——— beginning ———, 19—, and defendant agreed to pay rental therefor at the rate of ——— dollars (\$——) per ———.
4. That on ———, 19—, defendant entered into possession of said premises and occupied said premises continuously until ———, 19—.
5. That defendant has failed and refused to pay him the agreed rental for the period from ———, 19—, to ———, 19—.
6. The amount due plaintiff from defendant is ——— dollars (\$——), with interest from ———, 19—.
7. Default for failure to appear was entered herein against the defendant on ———, 19—.
8. Defendant is not an infant or incompetent person.

John Doe.

Subscribed and sworn to before me this ——— day of ———, 19—.

Official character.

Cross-Reference.

See note to Form 640.

643. Judgment by Default by Clerk.

(Caption.)

This action having been brought to recover a sum certain, to wit, rent on a written lease, and it appearing from the affidavit of ——— verified on ———, 19—, that the amount due plaintiff from defendant is ———

dollars (\$——); with interest from ——, 19—; that defendant has been defaulted for failure to appear and that defendant is not an infant or incompetent person, it is

Adjudged, that the plaintiff AB recover of the defendant CD the sum of —— dollars (\$——), with interest thereon from the —— day of ——, 19—, amounting to —— dollars (\$——) and costs amounting to —— dollars (\$——), aggregating the sum of —— dollars (\$——) and that plaintiff have execution therefor.

Date——.

Clerk.

644. Notice of Application for Judgment by Default by Court.

(Caption.)

To——.

Attorney for defendant.

Address.

Please take notice that on ——, 19—, at —— M., plaintiff will move this court for judgment by default for the relief demanded in the complaint on the ground that defendant failed to serve interrogatories submitted to him after proper service thereof, as more fully appears from the annexed affidavit of —— sworn to on ——, 19—.

Date——.

Attorney for plaintiff.

Note.

Three days' notice of the application for judgment by default is required if

the defaulting party has appeared in the action.

645. Judgment by Default by Court.

(Caption.)

This action was heard on motion of plaintiff for judgment by default and it appearing to the court that defendant, having appeared herein, failed to serve answers to interrogatories after proper service of such interrogatories, that this is an action for [relief other than for money judgment] and that defendant is not an infant or incompetent person, the court being fully advised, it is

Adjudged, that plaintiff recover of the defendant [relief demanded in the complaint] and costs in the sum of —— dollars (\$——).

Date——.

United States district judge.

646. Notice of Motion to Set Aside a Default Judgment.

(Caption.)

To _____
 Attorney for plaintiff.

 Address.

Please take notice that on ———, 19—, at ——— M., defendant will move this court at ——— for an order setting aside the default and also the default judgment against defendant entered herein on ———, 19—, on the ground that defendant's failure to plead or otherwise defend within the time prescribed which constituted the ground for the entry of the default and the ensuing default judgment was the result of excusable neglect in that [here set forth reasons for the neglect].

 Attorney for defendant.

Date——.

 Address.

Cross-Reference.

See notes to Forms 640, 661.

Federal Rules of Civil Procedure.

"For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b)." Rule 55 (c).

"The provisions of this rule apply whether the party * * * is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counter-claim. * * *" Rule 55 (d).

"No judgment by default shall be entered against the United States or an

officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." Rule 55 (e).

NOTE OF ADVISORY COMMITTEE TO RULE 55 (e): "This restates substantially the last clause of U. S. C., Title 28, § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U. S. C., Title 28, § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified in so far as they contain anything inconsistent therewith."

647. Order Setting Aside Default and Default Judgment.

(Caption.)

This action was heard on defendant's motion to set aside the default and the default judgment against him entered in this action on ———, 19—, and it appearing that defendant's failure to plead or otherwise defend, upon which failure the said default and default judgment were entered, was the result of excusable neglect, and the court being fully advised, it is

Ordered, that the default and the default judgment against defendant entered herein on ———, 19—, be and they are hereby set aside and defendant is allowed ——— days from the date hereof in which to plead.

Date——.

 United States district judge.

Cross-Reference.

See notes to Forms 640, 646, 661.

648. Notice of Motion for Summary Judgment.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that on _____, 19____, at _____ M., or as soon thereafter as counsel can be heard, plaintiff will move the court at _____ for summary judgment, on the ground that the pleadings, depositions, admissions, and affidavits on file in this action show that there is no genuine issue as to any material fact and none of the defenses set forth in the answer is sufficient in law.

Attorney for plaintiff.

Date_____.

Address.

Cross-Reference.

See notes to Form 610.

Federal Rules of Civil Procedure.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 12 (c).

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Rule 56 (a).

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56 (b).

"The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c).

"If * * * judgment is not rendered on the whole case * * * and a trial is necessary, the court * * * by examining the pleadings and the evidence * * * and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are * * * controverted. It shall thereupon make an order * * * directing such further proceedings in the action as are just. * * *" Rule 56 (d).

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." Rule 56 (e).

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Rule 56 (f).

NOTE OF ADVISORY COMMITTEE TO RULE 12 (c): "Compare Equity Rule 33 (Testing Sufficiency of Defense); N. Y. R. C. P. (1937) Rules 111 and 112."

NOTE OF ADVISORY COMMITTEE TO RULE 56: "This rule is applicable to all actions, including those against the United States or an officer or agency thereof."

"Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

"In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated

or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14a, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) § 14260) and Illinois (Ill. Rev. Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N. Y. R. C. P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommended that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L. J. 423.

"See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the note thereto.

"These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30."

NOTES TO DECISIONS

Case Not Fully Adjudicated on Motion [Rule 56 (d)].

If only part of the material facts are controverted, it is the duty of the court on a motion for summary judgment to make an order specifying such facts and direct that the trial be confined to the issues which remain in dispute. *Associates Discount Corp. v. Crow*, — App. D. C. —, 110 Fed. (2d) 126.

In an action by the government against numerous defendants to enforce order of the Secretary of Agriculture regulating the handling of milk, summary judgment was granted for the plaintiff, reserving for subsequent determination questions as to the status of certain of the defendants and the amount due from each. *United States v. Buttrick Co.* (D. C. Mass.), 28 Fed. Supp. 878.

When summary judgment is denied because of the existence of issues upon which evidence should be adduced, the court may make an order specifying those issues which are admitted and

those which remain to be tried. *Delaney v. Markham & Callow, Inc.* (D. C.-Ore.), 55 Bull. 43.

Although the doctrine of *stare decisis* should not be applied in the interpretation of the rules, the spirit of the decisions under a particular rule should be considered. *Delaney v. Markham & Callow, Inc.* (D. C.-Ore.), 55 Bull. 43.

For Claimant [Rule 56 (a)].

The granting of a summary judgment does not deprive the losing party of his right to a jury trial if such party has the burden of proof on the only issue raised and fails to show that it is able to adduce any proof in discharge of such burden. *Port of Palm Beach Dist. v. Goethals* (C. C. A. 5), 104 Fed. (2d) 706.

Granting summary judgment does not deprive the losing party of his right to cross-examine the affiants for the moving party, if it appears that even if the case went to trial it would be unnecessary for the prevailing party to call them as wit-

nesses. Port of Palm Beach Dist. v. Goethals (C. C. A. 5), 104 Fed. (2d) 706.

A motion for a summary judgment will not be granted, if there is an issue of fact to be tried. Port of Palm Beach Dist. v. Goethals (C. C. A. 5), 104 Fed. (2d) 706; Walsh v. Connecticut Mut. Life Ins. Co. (D. C.-N. Y.), 26 Fed. Supp. 566; Boerner v. United States (D. C.-N. Y.), 26 Fed. Supp. 769; Ottinger v. General Motors Corp. (D. C.-N. Y.), 27 Fed. Supp. 508; Phoenix Hdw. Co. v. Paragon Paint & Hdw. Corp. (D. C.-N. Y.), 1 Fed. R. Dec. 116; United States v. Charles (D. C.-N. Y.), 1 Fed. R. Dec. 121.

In an action by the government for a mandatory injunction to compel a milk-handler to comply with a marketing agreement order by making payments for a period during which operation of the order had been suspended, a preliminary injunction was reversed. The court suggested that after defendant answered, a motion for summary judgment could be made, entailing very little more delay. Dissenting opinion suggests the desirability of an amendment to the rules so as to permit plaintiff, as well as the defendant, to move for summary judgment without waiting for the filing of an answer. United States v. Adlers Creamery, Inc. (C. C. A. 2), 107 Fed. (2d) 987.

Summary judgment was properly granted to plaintiff in an action by the insured on a policy insuring against loss of fruit from freezing, it appearing from the pleadings, depositions, and affidavits, that there were no issues of fact with respect to the terms of the policy or the extent of the loss sustained. American Ins. Co. v. Gentile Bros. Co. (C. C. A. 5), 109 Fed. (2d) 732.

Plaintiff's motion for a summary judgment in an action for goods sold and delivered should be granted, even though counterclaims are pending, when defendant admits his indebtedness but secures repeated continuances of the trial. Seagrams-Distillers Corp. v. Manos (D. C.-S. C.), 25 Fed. Supp. 233.

Pendency of a counterclaim does not prevent granting of motion for summary judgment on plaintiff's claim and ordering separate trial on counterclaim, when defendant admits the plaintiff's claim but obtains repeated continuances of the trial. See Rule 42 (b). Seagram-Distillers Corp. v. Manos (D. C.-S. C.), 25 Fed. Supp. 233.

In an action against an unsecured creditor to recover money paid him by the bankrupt, a motion for summary judgment was granted when affidavits on file conclusively showed that the defendant was paid his claim in full from the proceeds of the sale of the bankrupt's property within the statutory four months' period. Culhane v. Jackson Hdw. Co. (D. C.-S. D.), 25 Fed. Supp. 324.

Summary judgment should not be granted in a patent suit in which the issues involve the validity and alleged infringement of unadjudicated patents. Refractolite Corp. v. Prismo Holding Corp. (D. C.-N. Y.), 25 Fed. Supp. 965.

Summary judgment procedure may be invoked in a suit against the United States under the Tucker Act. Boerner v. United States (D. C.-N. Y.), 26 Fed. Supp. 769.

Defendant, who was sued individually and as executrix of an estate, in an action by the government to recover an additional estate tax, conceded the liability of the estate but disclaimed any personal liability. Plaintiff's motion for summary judgment should be granted. United States v. Wolff (D. C.-N. Y.), 26 Fed. Supp. 940.

Summary judgment for plaintiff may be granted after affirmative defenses which present the only issues in the case have been stricken for insufficiency. Hartford Acc. & Indem. Co. v. Lloyd Flanagan (D. C.-Ohio), 28 Fed. Supp. 415; City National Bank v. Montrose Industrial Bank (D. C.-N. Y.), 29 Fed. Supp. 566; Phoenix Hdw. Co. v. Paragon Paint & Hdw. Corp. (D. C.-N. Y.), 1 Fed. R. Dec. 116.

Motion for summary judgment should be denied if the court, upon the entire record, is unable to find that a trial would be a useless form. Saunders v. Higgins (D. C.-N. Y.), 29 Fed. Supp. 326.

In an action by a trustee in bankruptcy to recover certain preferential payments made to an unsecured creditor, a motion for summary judgment was granted when the defendant admitted payment and when affidavits on file conclusively showed that the defendant must have known the bankrupt was insolvent at the time payment was made. New York Credit Mens Assn. v. Chaityn (D. C.-N. Y.), 29 Fed. Supp. 652.

The government, in aid of collecting a tax, brought suit to recover a debt ow-

ing by defendant to taxpayer. The defendant pleaded that he owed taxpayer nothing at time of demand for tax; and that the tax assessment was illegal because based on information obtained by illegal search and seizure. The government moved for summary judgment. Defenses are insufficient and summary judgment should be rendered for plaintiff. *United States v. Long Island Drug Co., Inc.* (D. C.-N. Y.), 29 Fed. Supp. 737.

Doubt is expressed whether an affidavit by counsel is sufficient on a motion for summary judgment, in the absence of adequate explanation of failure to submit an affidavit by a party. *United States v. Long Island Drug Co., Inc.* (D. C.-N. Y.), 29 Fed. Supp. 737.

Summary judgment may be granted properly in an action to recover the benefits under a life insurance policy, there being no disputed question of fact and the only question being one of law as to the construction of the clause designating beneficiaries. *Fink v. Northwestern Mut. Life Ins. Co.* (D. C.-Mich.), 29 Fed. Supp. 972.

In an action for declaratory judgment brought by an insurance company to determine its liability under a policy of insurance on an automobile involved in collision with a train resulting in the death of the insured, his wife, and daughter, summary judgment was denied, there being an issue of fact as to whether notice of the accident had been given to the company. *General Acc. Fire & Life Assur. Corp., Ltd. v. Morgan* (D. C.-N. Y.), 30 Fed. Supp. 753.

In an action to recover a bank stock assessment, an answer which avers that defendant has no knowledge of matters of public record concerning the closing of the bank, and after reasonable investigation is unable to ascertain the truth of the allegations as to such matters, is insufficient to raise issues to prevent summary judgment, since the court is not bound to accept statements in a pleading which to the common knowledge of all intelligent persons are plainly untrue. *Nieman v. Long* (D. C.-Pa.), 31 Fed. Supp. 30.

In an action by a trustee in bankruptcy to recover certain preferential payments, a previous determination in the bankruptcy proceedings that such payments were preferential is res judicata and a motion by plaintiff for sum-

mary judgment should be granted. *Levinson v. Cohen* (D. C.-N. Y.), 31 Fed. Supp. 96.

An insufficient answer fails to raise issues and therefore presents a case for summary judgment for plaintiff. *Nieman v. Bethlehem Nat. Bank* (D. C.-Pa.), 32 Fed. Supp. 436.

In an action on a judgment, motion for summary judgment granted reserving for the trial the determination of amount due. *Larson v. Holten* (D. C.-Minn.), 1 Fed. R. Dec. 109.

Summary judgment should be granted if the court is convinced from the record that if the action were permitted to go to trial a verdict would necessarily be directed for the moving party. *Mutual Life Ins. Co. v. Ballard* (D. C.-Fla.), 1 Fed. R. Dec. 180.

In an action by an insurance company for a declaratory judgment, adjudicating its right to receive premiums under the disability provisions of one of its policies, summary judgment was granted for the insurance company, it appearing that insured was not disabled under the terms of the policy. *Mutual Life Ins. Co. v. Ballard* (D. C.-Fla.), 1 Fed. R. Dec. 180.

Plaintiff's motion to dismiss without prejudice filed after service of an answer which discloses that the suit is barred by the statute of limitations should be denied. See Rule 41 (a). *Baker v. Sisk* (D. C.-Okla.), 1 Fed. R. Dec. 232.

For Defending Party [Rule 56 (b)].

Motion for summary judgment dismissing certain causes of action should be granted if it appears from the pleadings that such causes are barred by the statute of limitations. *Monroe v. Ordway* (C. C. A. 8), 103 Fed. (2d) 813; *Means v. MacFadden Publications* (D. C.-N. Y.), 25 Fed. Supp. 993; *McGrath v. Rubinstein, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 822; *Downey v. Palmer* (D. C.-N. Y.), 32 Fed. Supp. 344; *Baker v. Sisk* (D. C.-Okla.), 1 Fed. R. Dec. 232.

Motion for summary judgment may be made in contempt proceedings. In re *Tracey* (C. C. A. 2), 106 Fed. (2d) 96.

A complaint charging that defendants refused to buy milk from the plaintiff in pursuance of an alleged agreement entered into by them in restraint of trade, presents an issue of fact requir-

ing answer by the defendants and therefore should not be disposed of by summary judgment before answer filed. *Nickolson v. Nestles Milk Products Corp., Inc.* (C. C. A. 5), 107 Fed. (2d) 17.

In patent suits, motions to dismiss because the patent is void on its face should not ordinarily receive favorable consideration. *Gatch Wire Goods Co. v. W. A. Laidlaw Wire Co.* (C. C. A. 7), 108 Fed. (2d) 433.

Although motions for summary judgment have generally been denied in patent cases, it is not an invariable rule to do so. *Gatch Wire Goods Co. v. W. A. Laidlaw Wire Co.* (C. C. A. 7), 108 Fed. (2d) 433; *Oltarsh v. Goodyear Fabrics Corp.* (D. C.-N. Y.), 30 Fed. Supp. 265.

Motion for summary judgment should be denied as to a claim over which court lacks jurisdiction. *Pierce v. Submarine Signal Co.* (D. C.-Mass.), 25 Fed. Supp. 862.

A summary judgment for the defendant should not be granted in a patent suit if the record, consisting of the pleadings and answers to interrogatories, indicates that the defendant may have been guilty of acts of infringement other than the one specifically admitted but claimed by him as a matter of law not to constitute infringement. *Charles Blum Adv. Corp. v. L. & C. Mayers Co.* (D. C.-Pa.), 25 Fed. Supp. 934, 40 U. S. P. Q. 64.

In an action against a master for negligence of his servant, a prior judgment in favor of the servant against the same plaintiff may be pleaded as res judicata. Motion for summary judgment showing the foregoing by affidavit was granted. *Mabardy v. Railway Exp. Agency* (D. C.-Mass.), 26 Fed. Supp. 25.

Motion for summary judgment should be denied in an action on an account stated, if it appears from the pleadings and affidavits that the parties are not in agreement upon the balance due. *Warner v. Marsh* (D. C.-N. Y.), 26 Fed. Supp. 814.

In an action for negligence, defendant's motion for summary judgment should be granted, if it appears by affidavits that evidence was lacking to support a finding that the defendant was guilty of negligence. *Hufner v. Erie R. Co.* (D. C.-N. Y.), 26 Fed. Supp. 855.

Plaintiff may move for a summary judgment dismissing the counterclaim of a third-party defendant, if the latter

is not entitled to recover on the counterclaim. *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.* (D. C.-N. Y.), 27 Fed. Supp. 121.

On a motion for summary judgment in an action on a lease of a building in which the issue raised is whether the building had been destroyed or merely damaged, the court may resolve the question, determine that there is no genuine issue, and grant the motion. *Heart of America Lbr. Co. v. Belove* (D. C.-Mo.), 28 Fed. Supp. 619.

Summary judgment should not be granted in a patent suit if there is a substantial issue as to infringement, even though the question of validity is not presented, since infringement is a question of fact. *Van Wormer v. Champion Paper & Fibre Co.* (D. C.-Ohio), 28 Fed. Supp. 813.

A motion to dismiss the complaint on the ground it fails to state a claim must be limited to the pleadings and may not be supported by affidavits. Where affidavits are relied upon, the proper motion is for summary judgment. *Sherover v. Wanamaker* (D. C.-N. Y.), 29 Fed. Supp. 650.

Motion for summary judgment should be denied if the defendant pleads res judicata and it does not appear that the parties and issues involved in the former action are the same as those involved in the present case. *McGrath v. Rubinstein, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 822.

In the absence of a federal statute of limitations, the applicable state statute controls. *McGrath v. Rubinstein, Inc.* (D. C.-N. Y.), 29 Fed. Supp. 822; *Downey v. Palmer* (D. C.-N. Y.), 32 Fed. Supp. 344.

In an action against a federal reserve bank by a finder of United States currency to recover the face value thereof, summary judgment was granted for defendant, it appearing that the currency had previously been redeemed and canceled by the government and that plaintiff's claim was unworthy of belief. *Gross v. Federal Reserve Bank* (D. C.-Ohio), 29 Fed. Supp. 1005.

The beneficiary of a life insurance policy who had been joined as a claimant in an interpleader action by the insurer was granted summary judgment although he was charged by the other claimants, next of kin of the insured, with having exercised undue influence

upon the insured, there being no competent, relevant, or material evidence to support such charges. *Mutual Life Ins. Co. v. O'Donnell* (D. C.-Ill.), 29 Fed. Supp. 1010.

Motion by defendant for summary judgment was denied in a patent infringement action in which the moving party urged as partial grounds for the motion, certain admissions which had been made by the other party in another action. *Oltarsh v. Goodyear Fabrics Corp.* (D. C.-N. Y.), 30 Fed. Supp. 265.

In an action for personal injuries resulting from the explosion of a bottle of beverage in which the manufacturer of the bottle, the bottler, and the retailer were joined as defendants, and plaintiff relies solely on the doctrine of *res ipsa loquitur*, defendants' motion for summary judgment was granted, since such doctrine applies if defendant had exclusive control of the thing which caused the injury. *Sanders v. Nehi Bottling Co.* (D. C.-Tex.), 30 Fed. Supp. 332.

Motion by defendant in trade-mark action for summary judgment denied because defenses presented issues of fact. *Lip Lure, Inc. v. Bloomingdale Bros., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 388.

The usual practice of denying motions for summary judgment in patent cases is equally applicable to trade-mark cases. *Lip Lure, Inc. v. Bloomingdale Bros., Inc.* (D. C.-N. Y.), 30 Fed. Supp. 388.

Summary judgment may be granted in an action for patent infringement in which the parties are in agreement on all points except the equivalency of defendant's device if, by objective examination of both devices, the court is able to determine the question of similarity and thus resolve the issue of infringement. In a companion case the court was unwilling to make a similar disposition of the same issue by examination of blue prints only of the devices. *Gasifier Mfg. Co. v. Ford Motor Co.* (D. C.-Mo.), 1 Fed. R. Dec. 10.

Summary judgment should be granted in a jury action if it appears from the record on the motion that the court would direct a verdict were the case to go to trial. *Gasifier Mfg. Co. v. Ford Motor Co.* (D. C.-Mo.), 1 Fed. R. Dec. 10.

In an action for benefits under an accident insurance policy which excluded injuries sustained while the insured was on duty as an employee of a steam

railroad, defendant's motion for summary judgment should be granted, it appearing from the pleadings and affidavits that the deceased died as a result of injuries received while acting as a conductor on a railroad train. *Whiteman v. Federal Life Ins. Co.* (D. C.-Mo.), 1 Fed. R. Dec. 95.

A defense of *res judicata* is insufficient and does not warrant summary judgment for the defendant or judgment on the pleadings if the claim is based on facts transpiring subsequently to the prior judgment. *Phoenix Hdw. Co. v. Paragon Paint & Hdw. Corp.* (D. C.-N. Y.), 1 Fed. R. Dec. 116.

In an action for invasion of privacy by publication of plaintiff's picture, defendants' motion for summary judgment should be denied, the defense that the use of the picture was authorized being contradicted. *Banks v. King Features Syndicate, Inc.* (D. C.-N. Y.), 22 Bull. 59.

Form of Affidavits; Further Testimony [Rule 56 (e)].

On motion for summary judgment, if affidavits are submitted going beyond the pleadings, the pleadings may, in the exercise of discretion, be treated as amended to conform to the proof. *Seaboard Terminals Corp. v. Standard Oil Co.* (C. C. A. 2), 104 Fed. (2d) 659.

Affidavits in support of a motion for summary judgment should contain only statements which would be admissible in evidence. *Saunders v. Higgins* (D. C.-N. Y.), 29 Fed. Supp. 326.

Doubt is expressed whether an affidavit by counsel is sufficient on a motion for summary judgment, in the absence of adequate explanation of failure to submit an affidavit by a party. *United States v. Long Island Drug Co., Inc.* (D. C.-N. Y.), 29 Fed. Supp. 737.

An affidavit in support of a motion for summary judgment which seeks to alter, vary, or contradict the terms of a resolution adopted by a corporation, is subject to a motion to strike since such affidavit is an attempt to vary the terms of a written instrument by parol evidence and therefore inadmissible. *Fox v. Johnson* (D. C.-D. C.), 31 Fed. Supp. 64.

Motion and Proceedings Thereon [Rule 56 (c)].

An order denying summary judgment is not a final judgment and therefore is

not appealable. *Jones v. St. Paul Fire & Marine Ins. Co.* (C. C. A. 5), 108 Fed. (2d) 123.

The Federal Housing Administration insured payment of a promissory note given to a bank to enable the makers to buy an oil burner. On default by makers, payee obtained from the government payment of the balance due and indorsed the note over to it. In an action on the note by the government, defendant's answer alleged that the oil burner was defective and that plaintiff was not a holder in due course. Pleadings, depositions, and affidavits on file showed no genuine issue as to any material fact and plaintiff's motion for summary judgment was granted. *United States v. McCulloch* (D. C.-N. Y.), 26 Fed. Supp. 7.

On a motion for summary judgment, the court should disregard all statements based upon hearsay in the supporting and opposing affidavits. *Boerner v. United States* (D. C.-N. Y.), 26 Fed. Supp. 769.

In an action to enforce stockholder's liability in which defendant pleaded that he had transferred the stock to another more than 60 days before the bank failed to meet its obligations, neither party is entitled to summary judgment if there is an issue as to the date on which the bank failed. *Schram v. Clair* (D. C.-N. Y.), 28 Fed. Supp. 422.

Suspicious are not sufficient to raise a genuine issue of fact and consequently motion for summary judgment will not be denied merely because of suspicions advanced by counsel for adverse party. *Banco de Espana v. Federal Reserve Bank* (D. C.-N. Y.), 28 Fed. Supp. 958.

In view of the fact that the statute of limitations is an affirmative defense to be asserted in a pleading rather than a motion, defendant's motion to dismiss for failure to state a claim which raises the issue of the statute, may therefore be treated as an answer. See Rule 8 (c). *Baker v. Sisk* (D. C.-Okla.), 1 Fed. R. Dec. 232.

Motion for Judgment on the Pleadings [Rule 12 (c)].

Plaintiff is not entitled to summary judgment or to judgment on the pleadings, if a material issue of fact is raised by the answer. *Caterpillar Trac. Co. v. International Harvester Co.* (C. C. A. 9), 106 Fed. (2d) 769; *Phoenix Hdw. Co. v.*

Paragon Paint & Hdw. Corp. (D. C.-N. Y.), 1 Fed. R. Dec. 116.

Judgment on the pleadings should not be rendered in a suit by the Interstate Commerce Commission to restrain defendant from transporting passengers as a common carrier without having secured a certificate of convenience and necessity, where defendant denies being a common carrier. *Interstate Commerce Comm. v. Frye* (D. C.-Mass.), 26 Fed. Supp. 393.

After defendant notifies the clerk that he does not desire to contest the action, plaintiff's motion for judgment on the pleadings should not be granted but a default may be entered under Rule 55 (b) upon application therefor by plaintiff. *Interstate Commerce Comm. v. Daley* (D. C.-Mass.), 26 Fed. Supp. 421.

Although defendant admits having committed acts sought to be enjoined, a motion for judgment on the pleadings should be denied if answer also disclaims all intention of continuing such action. *Interstate Commerce Comm. v. Chester* (D. C.-Pa.), 26 Fed. Supp. 710.

Demurrer may be treated as a motion for judgment on the pleadings. *Equitable Life Assur. Soc. v. Kit* (D. C.-Pa.), 26 Fed. Supp. 880; *Lehigh Valley Trust Co. v. United States* (D. C.-Pa.), 40 Bull. 9.

In patent infringement suit, motion for judgment by default was denied and motion for bill of particulars was granted. *Kohloff v. Ford Motor Co.* (D. C.-N. Y.), 27 Fed. Supp. 808.

Where defendant failed to make motion to dismiss complaint at proper time, it could still make a motion for judgment on the pleadings. *Duarte v. Christie Scow Corp.* (D. C.-N. Y.), 27 Fed. Supp. 894.

On motion for judgment on the pleadings, no consideration may be given to a stipulation of facts entered into solely for use at the trial. *Guggenheim v. Rasquin* (D. C.-N. Y.), 28 Fed. Supp. 322.

Motion for judgment on a counterclaim to which no reply has been filed may not be entertained but such motion may be treated as a motion to dismiss the counterclaim for insufficiency. *Van Dyke v. Broadhurst* (D. C.-Pa.), 28 Fed. Supp. 737.

An affirmative defense of lack of jurisdiction pleaded in the answer may not be brought on for hearing by a motion for judgment on the pleadings. It

might have been raised by motion to dismiss prior to answer. Having answered, the defendant may not raise it again until the trial, when it may be brought up by a motion to dismiss. *Gantz v. National Casualty Co.* (D. C.-N. Y.), 29 Fed. Supp. 41.

Admissions contained in a reply may be considered on a motion for judgment on the pleadings, even though the service of a reply was not authorized. *United States Trust Co. v. Sears* (D. C.-Conn.), 29 Fed. Supp. 643.

Formal findings of fact are not required if all statements of fact made on behalf of either party are admitted in the pleadings. *United States Trust Co. v. Sears* (D. C.-Conn.), 29 Fed. Supp. 643.

A motion for judgment on the pleadings is not appropriate to test the legal sufficiency of some of the defenses set forth in the answer, since such a motion is proper only if all the defenses are insufficient and the moving party is entitled to judgment. *Dysart v. Remington Rand, Inc.* (D. C.-Conn.), 31 Fed. Supp. 296.

No reply is required except to a counterclaim or when ordered by the court. Hence, plaintiff need not deny allegations contained in the answer and the defendant's motion for judgment on

the pleadings on the ground of insufficient denial of allegations of the answer should be denied. *Central Trust Co. v. Second Nat. Bank* (D. C.-Pa.), 1 Fed. R. Dec. 98.

A defense of *res judicata* is insufficient and does not warrant summary judgment for the defendant or judgment on the pleadings if the claim is based on facts transpiring subsequently to the prior judgment. *Phoenix Hdw. Co. v. Paragon Paint & Hdw. Corp.* (D. C.-N. Y.), 1 Fed. R. Dec. 116.

An affidavit of defense under the Pennsylvania practice raising questions of law, filed prior to the effective date of the Federal Rules of Civil Procedure, will be treated as a motion for judgment on the pleadings. *Salus v. Federal Reserve Bank* (D. C.-Pa.), 15 Bull. 3.

When Affidavits are Unavailable [Rule 56 (f)].

Consideration of a motion for summary judgment should not be deferred to permit depositions to be taken by the opposing party in the absence of clear showing of the facts, a specification of the persons sought to be examined, and what facts each is likely to establish. *Shultz v. Manufacturers & Traders Trust Co.* (D. C.-N. Y.), 30 Fed. Supp. 443.

649. Order for Summary Judgment.

(Caption.)

This cause was heard on defendant's motion for summary judgment, and the court having considered the motion, the pleadings, and affidavits on file, and being fully advised in the premises, it is

Ordered and adjudged, that defendant's motion for summary judgment be and the same is hereby sustained and that costs be assessed against the plaintiff.

Date—.

United States district judge.

Source of Form.

Form adopted from an order entered in *Heart of America Lbr. Co. v. Belove* (D. C.-Mo.), 28 Fed. Supp. 619.

Cross-Reference.

In connection with Forms 649 to 656, see notes to Form 648.

650. Summary Judgment.

(Caption.)

JUDGMENT

This action came on for hearing on plaintiff's (defendant's) motion for summary judgment, and the court having granted said motion, it is hereby
[Here use same clauses as in judgment on pleadings.]

Dated—— at——.

Clerk.

651. Notice of Motion by Plaintiff for Judgment on the Pleadings.

(Caption.)

To——
Attorney for defendant.

Address.

Please take notice that on —— —, 19—, at —— —. M., or as soon thereafter as counsel can be heard, plaintiff will move this court at —— for judgment on the pleadings in favor of plaintiff.

Attorney for plaintiff.

Date——.

Address.

652. Notice of Motion by Defendant for Judgment on the Pleadings.

(Caption.)

To——
Attorney for plaintiff.

Address.

Please take notice that on —— —, 19—, at —— —. M., or as soon thereafter as counsel can be heard, defendant will move this court at —— for judgment on the pleadings dismissing the complaint in this action.

Attorney for defendant.

Date——.

Address.

653. Order Denying Motion for Judgment on the Pleadings.

(Caption.)

This cause was heard on plaintiff's motion for judgment in his favor on the pleadings, and the court, having considered said motion and the

amended complaint and answer filed herein, and being fully advised, it is Ordered, that the said motion be and it is hereby denied.

Date——.

United States district judge.

654. Order Granting Motion for Judgment on the Pleadings.

(Caption.)

This cause was heard on plaintiff's motion for judgment on the pleadings, and it appearing to the court that the pleadings filed herein show that plaintiff is entitled to judgment in his favor, and the court being fully advised, it is

Ordered and adjudged, that judgment on the pleadings be entered herein in favor of plaintiff for the sum of — dollars (\$—), with interest from — —, 19—, and costs.

Date——.

United States district judge.

655. Judgment on Order Granting Motion for Judgment on Pleadings.

(Caption.)

An order granting plaintiff's motion for judgment on the pleadings, dated — —, 19—, having been entered herein, it is

Adjudged, that plaintiff — recover from the defendant the sum of — dollars (\$—), the amount claimed, with interest from — —, 19—, amounting to — dollars (\$—), together with the sum of — dollars (\$—), costs, aggregating the sum of — dollars (\$—).

Date——.

United States district judge.

656. Judgment on the Pleadings (Alternative Form).

(Caption.)

JUDGMENT

This action came on for hearing on plaintiff's (defendant's) motion for judgment on the pleadings, and the court having granted said motion, it is hereby

Adjudged, that the plaintiff AB recover of the defendant CD the sum of — dollars (\$—), with costs in the sum of — dollars (\$—), aggregating the sum of — dollars (\$—), and that the plaintiff have execution therefor

OR

Adjudged, that this action be and it hereby is dismissed on the merits; and that the defendant CD recover of the plaintiff AB the sum of — dollars (\$—), his costs as taxed and have execution therefor.

Dated — at —.

Clerk.

657. Motion for New Trial—Various Grounds Alleged.

(Caption.)

To _____

Attorney for plaintiff.

Address.

Please take notice that on ———, 19——, at ——— M., defendant will move this court at ——— to set aside the verdict and for a new trial on the following grounds:

1. There was no substantial evidence to sustain the verdict.
2. The court erred in submitting the issues to the jury.
3. The verdict was contrary to law.
4. The court erred in overruling defendant's objections to [designate evidence objected to].
5. The court erred in refusing to instruct the jury to render a verdict for the defendant (plaintiff).
6. The court erred in sustaining plaintiff's objections to [evidence offered by defendant and excluded upon plaintiff's objections].
7. The court erred in refusing to instruct the jury as follows: ——— as requested by defendant.
8. The court erred in charging the jury as follows: "——."
9. The verdict is excessive.
10. The court erred in directing a verdict for plaintiff (defendant).
11. After said verdict was rendered, defendant received information of the misconduct of a juror, to wit ———.

Attorney for defendant.

Date——.

Address.**Note.**

Such of the foregoing grounds or any others as are applicable should be used.

Cross-Reference.

See notes to Form 658.

Statutory Reference.

Motion for new trial, harmless error, 8 F. C. A., Title 28, § 391; U. S. C. A., Title 28, § 391; id. U. S. C.

Federal Rules of Civil Procedure.

"A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at

law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Rule 59 (a).

NOTE OF ADVISORY COMMITTEE TO RULE 59: "This rule represents an amalgamation of the petition for rehearing of Equity Rule 69 (Petition for Rehearing) and the motion for new trial of U. S. C., Title 28, § 391 (New trials; harmless error), made in the light of the experi-

ence and provision of the code states. Compare Calif. Code Civ. Proc. (Deering, 1937) §§ 656-663a. U. S. C., Title 28, § 391 (New trials; harmless error) is thus substantially continued in this rule. U. S. C., Title 28, § 840 (Executions; stay on conditions) is modified in so far as it contains time provisions inconsistent with Subdivision (b). For the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States*, 270 U. S. 151 (1926); *Aspen Mining and Smelting Co. v. Billings*, 150 U. S. 31 (1893).

"For partial new trials which are permissible under Subdivision (a), see *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U. S. 494 (1931); *Schuerholz v. Roach*, 58 F. (2d) 32 (C. C. A. 4th,

1932); *Simmons v. Fish*, 210 Mass. 563 (1912) (sustaining and recommending the practice and citing federal cases and cases in accord from about sixteen states and contra from three states). The procedure in several states provides specifically for partial new trials. *Ariz. Rev. Code Ann.* (Struckmeyer, 1928) § 3852; *Calif. Code Civ. Proc.* (Deering, 1937) §§ 657, 662; *Ill. Rev. Stat.* (1937) ch. 110, § 216 (par. (f)); *Md. Ann. Code* (Bagby, 1924) Art. 5, §§ 25, 26; *Mich. Court Rules Ann.* (Searl, 1933) Rule 47, § 2; *Miss. Sup. Ct. Rule* 12, 161 *Miss.* 903, 905 (1931); *N. J. Sup. Ct. Rules* 131, 132, 147, 2 *N. J. Misc.* 1197, 1246-1251, 1255 (1924); 2 *N. D. Comp. Laws Ann.* (1913) 7844, as amended by *N. D. Laws* 1927, ch. 214."

NOTES TO DECISIONS

Grounds [Rule 59 (a)].

Before entry of judgment in an action tried without a jury, the court may, on motion for new trial on ground of newly-discovered evidence, allow the opening of the case for reception of such evidence. *United States v. Colangelo* (D. C.-N. Y.), 27 Fed. Supp. 921; *United States v. Parisi* (D. C.-N. Y.), 27 Fed. Supp. 922; *United States v. 3,376.1 Acres of Land* (D. C.-Ky.), 27 Fed. Supp. 1023.

Plaintiff sued the superintendent of insurance of Missouri for services rendered to an insurance company which subsequently to the rendition of the services was placed in the hands of defendant for liquidation, but at the trial failed to prove his case and defendant's motion to dismiss under Rule 41 (b) was granted. Plaintiff then moved for a new trial under this rule which motion was denied. *Southwell v. Robertson* (D. C.-Pa.), 27 Fed. Supp. 944.

658. Motion for New Trial—Newly-Discovered Evidence.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Please take notice that on _____, 19____, at _____ M., defendant will move this court at _____ for a new trial on the ground of newly-discovered evidence to wit: [Here insert].

Attorney for defendant.

Date_____.

Address.

Cross-Reference.

In connection with Forms 658 to 660, see notes to Form 657.

Federal Rules of Civil Procedure.

"A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a mo-

tion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence." Rule 59 (b).

"When a motion for new trial is based upon affidavits they shall be served with

the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits." Rule 59 (c).

NOTES TO DECISIONS

Time for Motion [Rule 59 (b)].

To secure consideration of a motion for a new trial after appeal has been taken, the moving party should move in the Appellate Court to remand the case. *Isgrig v. United States* (C. C. A. 4), 109 Fed. (2d) 131.

A bill of complaint was dismissed for defect of parties defendant. Later defendant filed motion to vacate the order, in that it was based on an erroneous conclusion of law. The motion should be denied, as more than ten days had expired between the entry of the decree and

the filing of the motion. *Nachod & United States Signal Co. v. Automatic Signal Corp.* (D. C.-Conn.), 26 Fed. Supp. 418.

The court may not enlarge the time for serving a motion for a new trial. *Theiss v. Owens-Illinois Glass Co.* (D. C.-Pa.), 1 Fed. R. Dec. 175.

A motion for new trial served after the expiration of ten days after entry of judgment may not be entertained. *Theiss v. Owens-Illinois Glass Co.* (D. C.-Pa.), 1 Fed. R. Dec. 175.

659. Order Granting New Trial.

(Caption.)

This action was heard on defendant's motion for a new trial on the ground of newly-discovered evidence and the court being fully advised it is

Ordered, that said motion be and the same is hereby sustained and a new trial is hereby granted.

Date_____.

United States district judge.

660. Order Overruling Motion for New Trial.

(Caption.)

This action was heard on defendant's motion to set aside the verdict and for a new trial, and the court being fully advised, it is

Ordered, that said motion be and it is hereby overruled.

Date_____.

United States district judge.

661. Motion to Correct Judgment.

(Caption.)

To_____

Attorney for defendant.

Address,

Please take notice that on ———, 19—, at ——— M., plaintiff will move this court at ——— to correct a clerical mistake in the judgment entered herein on ———, 19—, on the ground that said judgment is not in accordance with the order of this court dated ———, 19—, directing entry thereof, in that plaintiff is entitled to interest on the principal sum of said judgment from ———, 19—, instead of from ———, 19—, as provided in said judgment.

Date——.

United States district judge.

Cross-Reference.

See notes to Form 646.

Federal Rules of Civil Procedure.

"Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

"On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment

obtained against a defendant not actually personally notified." Rule 60 (a), (b).

NOTE OF ADVISORY COMMITTEE TO RULE 60: "See Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich. Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 464 (3); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89-2301 (3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va. Code Ann. (Michie, 1936) §§ 6329, 6333.

"Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif. Code Civ. Proc. (Deering, 1937) § 473. See also N. Y. C. P. A. (1937) § 108; 2 Minn. Stat. (Mason, 1927) § 9283.

"For the independent action to relieve against mistake, etc., see Dobie, Federal Procedure, pages 760-765, compare 639; and Simkins, Federal Practice, ch. CXXI (pp. 820-830) and ch. CXXII (pp. 831-834), compare § 214."

NOTES TO DECISIONS

Mistake; Inadvertence; Surprise; Excusable Neglect [Rule 60 (b)].

The court may not set aside a judgment, without a showing of legal grounds therefor or excuse for the moving party's negligence or default, solely for the purpose of restoring the proceeding to a status whereby plaintiff might effectually move to dismiss without prejudice. *Western Union T. Co. v. Dismang* (C. C. A. 10), 106 Fed. (2d) 362.

A bankruptcy court may grant leave to amend involuntary petition for corporate reorganization which has been dismissed previously, although the order

dismissing the petition omits leave to amend. *Kroell v. New York Ambassador, Inc.* (C. C. A. 2), 108 Fed. (2d) 294.

A judgment in a contract action may be corrected to include interest in compliance with the law of the appropriate state. *Stentor Elec. Mfg. Co., Inc. v. Klaxon Co.* (D. C.-Del.), 30 Fed. Supp. 425.

A judgment may not be modified by changing its amount, if more than six months have expired after entry of judgment. *Moran v. Moran* (D. C.-D. C.), 31 Fed. Supp. 227.

Judgment by default entered on personal service may not be set aside on motion made more than six months after entry of judgment. *Cassell v. Barnes* (D. C.-D. C.), 1 Fed. R. Dec. 15.

662. Order Correcting Clerical Mistake in Judgment.

(Caption.)

This action was heard on plaintiff's motion to correct a clerical mistake in the judgment entered herein on — —, 19—, and it appearing that by said judgment plaintiff was awarded interest on the principal sum of said judgment from — —, 19—, whereas, the order of this court directing entry of judgment directed that he be awarded interest from — —, 19—, and the court being advised, it is

Ordered, that the judgment entered herein on — —, 19—, be amended so as to read as follows: [Here insert].

Date—.

United States district judge.

Cross-Reference.

See notes to Form 661.

CHAPTER 20

CONTEMPT PROCEEDINGS

Form	Form
670. Notice of motion to punish for civil contempt.	675. Order for issuance of a writ of attachment.
671. Order adjudging a party to an action guilty of civil contempt and imposing sentence.	676. Writ of attachment.
672. Order directing a party to show cause in civil contempt proceeding.	677. Order adjudging witness guilty of civil contempt and imposing sentence.
673. Order directing witness to show cause in civil contempt proceeding.	678. Information charging criminal contempt.
674. Order denying motion to punish for contempt.	679. Petition to punish for criminal contempt.
	680. Order adjudging defendant guilty of criminal contempt.

INTRODUCTION.—The new Rules do not affect the distinction between criminal and civil contempts. Similarly, they do not have any effect on the procedure to punish criminal contempts. On the other hand, the possibility of civil contempts has been considerably enhanced, especially in view of the numerous ramifications of discovery rules. If during the taking of a deposition, the witness declines to answer any question, the examining counsel may apply to the court in the district where the deposition is being taken for an order compelling the witness to reply. The same procedure may be followed in respect to written interrogatories. The defeated party on such a motion is required to pay the reasonable expenses of the prevailing party, if the court finds that the position taken by the former was without substantial justification.

Refusal to be sworn or to answer questions after being directed to do so by the court is a contempt of that court. If the witness' refusal was not wilful, but was based on advice of counsel, the witness should be directed to answer. The motion to punish him for contempt should be withheld until after he has had an opportunity to do so. When the person whose deposition is to be taken is a party to the action, or an officer or managing agent of a party, his refusal to obey an order calling for the production of a document or any other object or an order for a physical or mental examination may lead to the imposition of other penalties. The court may make an order that the matters regarding which the questions were asked, or the contents of the document, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. The disobedient party may be precluded from introducing evidence in support or opposition of designated claims or defenses, or introducing

designated documents or evidence of physical or mental condition. The pleadings may be stricken, further proceedings may be stayed, the action may be dismissed, or a judgment by default taken. The arrest of the recalcitrant party may be ordered, unless the order disobeyed is an order for a physical or mental examination.

If a party or an officer or managing agent of a party wilfully fails to appear for the taking of a deposition, after being served with proper notice thereof, the court on motion and notice may strike out the pleading of such party, or dismiss the action, or enter a judgment by default. This remedy, however, does not extend to cases in which the recalcitrant witness is not a party to the action or an officer or managing agent of such party. In the latter event, the party seeking the examination should cause the witness to be served with a subpoena and should proceed in the event of failure to obey the subpoena as for a contempt of court. *Freeman v. Hotel Waldorf-Astoria Corp.* (D. C.-N. Y.), 27 Fed. Supp. 303.

It has been held that if a person who is a party to the action fails to appear in response to notice for the taking of his deposition, it is proper for the court to issue an order directing him to do so or to make proper proof of his physical inability to comply. *Cohn v. Annunziata* (D. C.-N. Y.), 27 Fed. Supp. 805.

670. Notice of Motion to Punish for Civil Contempt.

(Caption.)

To _____
Attorney for defendant.

Address.

Please take notice that at — — M., on — —, 19—, or as soon thereafter as counsel can be heard, plaintiff will move this court for an order punishing defendant for contempt in that he refused to be sworn (or to answer a question) at the taking of his deposition after having been directed to do so by order of this court, as more fully appears by affidavit of —, sworn to on — —, 19—, and hereto annexed.

Attorney for plaintiff.

Date —.

Address.

Cross-References.

Criminal contempt, Forms 678-680.
See notes to Forms 486, 491, 496.

Statutory References.

Contempt as a criminal offense, 8 F. C. A., Title 28, § 386; U. S. C. A., Title 28, § 386; id. U. S. C.

Contempt in proceedings before referee in bankruptcy, 3 F. C. A., Title 11, § 69; U. S. C. A., Title 11, § 69; id. U. S. C. Contempt, procedure, bail, attachment, trial, punishment, 8 F. C. A., Title 28, § 387; U. S. C. A., Title 28, § 387; id. U. S. C.

General provisions concerning contempt, 8 F. C. A., Title 28, §§ 385 to 390a; U. S. C. A., Title 28, §§ 385 to 390a; id. U. S. C.

Power of courts to punish contempt, 8 F. C. A., Title 28, § 385; U. S. C. A., Title 28, § 385; id. U. S. C.

Federal Rules of Civil Procedure.

Power of the courts to enforce discovery; answers of witnesses to questions, interrogatories, depositions; production of documents; submission to physical or mental examination; or to obey subpoena, see Rules 37 and 45.

NOTES TO DECISIONS

In General.

Where contempt proceedings are instituted against a person not a party to a civil action, the proper practice is to entitle the application for a rule to show cause in the civil action. *Employers Teaming Co. v. Teamsters Joint Council (C. C.-Ill.)*, 141 Fed. 679.

Appearance and filing of answers confers jurisdiction irrespective of defects in service of rule. *In re Marcus (D. C.-Pa.)*, 21 Fed. (2d) 480. *Affd.* 23 Fed. (2d) 303.

A civil contempt proceeding is part of the main case, and service of process is unnecessary, actual notice being suffi-

cient. *Teele Soap Mfg. Co. v. Pine Tree Products Co., Inc. (D. C.-N. H.)*, 8 Fed. Supp. 546.

Bankruptcy Proceedings.

Order for commitment is not invalid because it does not run in the name of the United States. *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. 269, 7 Am. B. 224.

If witness fails to appear, the referee should certify the facts to the judge, and an application for attachment in the first instance, without such certificate, is irregular. *In re Kerber (D. C.-Pa.)*, 125 Fed. 653, 10 Am. B. 747.

671. Order Adjudging a Party to an Action Guilty of Civil Contempt and Imposing Sentence.

(Caption as in original action.)

This action was heard on plaintiff's motion for an order punishing defendant — for contempt in that he refused to be sworn at the taking of his deposition after having been directed to do so by order of this court, and it appearing that a notice for the taking of his deposition as a witness herein, before —, a notary public, at his office at —, at — —. M. on — —, 19—, was duly served on the defendant; that defendant appeared at the time and place specified in said notice and was requested to be sworn for the purpose of taking his deposition; that defendant then and there refused to be sworn; whereupon this court duly made an order dated — —, 19—, directing defendant to be sworn for the taking of his deposition before said —, notary public, at —, at — —. M. on — —, 19—; that at said time and place defendant appeared and was again requested to be sworn for the purpose of taking his deposition and defendant again refused so to be sworn; and the court being fully advised, it is

Adjudged, that the defendant — is guilty of contempt of this court in that he declined and refused to be sworn as a witness at the taking of his deposition before —, a notary public, at —, on — —, 19—, although directed so to do by order of this court made on — —, 19—; and it is

Ordered, that the said defendant, —, be and he is hereby committed to the custody of the United States marshal for the — District of —, and that he stand committed until he complies with said order of —, 19—, and pays the costs of this proceeding, in the sum of — dollars (\$—).

Date—.

United States district judge.

Cross-Reference.

In connection with Forms 671 to 678,
see notes to Form 670.

672. Order Directing a Party to Show Cause in Civil Contempt Proceeding.

(Caption.)

It appearing by affidavit of —, sworn to on the — day of —, 19—, and the affidavit of —, sworn to on the — day of —, 19—, that defendant, — refused to be sworn (or to answer a question) at the taking of his deposition as a witness herein before —, at —, on the — day of —, 19—, after having been directed to do so by order of this court, and it appearing that a notice for the taking of his deposition before —, a notary public, at —, at — —. M. on —, 19—, was duly served on the said defendant; that the defendant appeared at the time and place specified in said notice and was requested to be sworn; that the defendant then and there refused to be sworn; whereupon this court duly made an order dated —, 19—, directing the defendant to be sworn for the purpose of taking his deposition before the said —, notary public at —, at — —. M. on —, 19—; that at said time and place the defendant appeared and was again requested to be sworn for the purpose of taking his deposition, and the defendant again refused to be sworn; and the court being fully advised, it is

Ordered, that John Doe be and he is hereby directed to show cause before this court at —, at — —. M., on the — day of —, 19—, why he should not be punished for contempt of this court for failure and refusal to comply with the order made by this court on —, 19—, whereby —.

Service of this order upon the said John Doe on or before —, 19—, shall be sufficient service thereof.

Date—.

United States district judge.

673. Order Directing Witness to Show Cause in Civil Contempt Proceeding.

(Caption as in original action.)

It appearing by affidavit of —, sworn to on —, 19—, that John Doe refused to be sworn (or to answer a question) at the taking of his

deposition as a witness herein before —, a notary public, at — on — —, 19—, after having been directed to do so by order of this court; and it appearing that a notice for the taking of his deposition as a witness herein before —, a notary public, at —, at — —. M., on — —, 19—, was duly served on the said John Doe; that the said John Doe appeared at the time and place specified in said notice and was requested to be sworn for the purpose of taking his deposition; that the said John Doe then and there refused to be sworn, whereupon this court duly made an order dated — —, 19—, directing the said John Doe to be sworn for the purpose of taking his deposition before the said —, notary public, at —, at — —. M., on — —, 19—; that at the said time and place the said John Doe appeared and was again requested to be sworn for the purpose of taking his deposition, and the said John Doe again refused to be sworn; and the court being fully advised, it is

Ordered, that the said John Doe appear before this court at —, on — —, 19—, at — —. M., to show cause, if any he has, why he should not be punished for contempt of court in that he refused to be sworn as a witness at the taking of his deposition before —, a notary public, at —, on — —, 19—, although having been directed to do so by order of this court, dated — —, 19—.

Service of this order upon the said John Doe on or before — —, 19—, shall be sufficient service thereof.

Date—.

United States district judge.

674. Order Denying Motion to Punish for Contempt.

(Caption.)

This action was heard on motion by plaintiff for an order that defendant be punished for contempt of court in that he violated an injunction issued in this action on — —, 19—, and the defendant having appeared and shown that he has not violated said injunction, the motion of the plaintiff is denied at plaintiff's costs.

Date—.

United States district judge.

675. Order for Issuance of a Writ of Attachment.

(Caption.)

This action was heard on motion of — for an order directing the issuance of a writ of attachment for the arrest of —, and it appearing that an order of this court dated — —, 19—, directing the said — to show cause why he should not be punished for contempt of court, was duly served on the said — on — —, 19—, and that on the return

date of said order the said — failed to appear in compliance with the said order, and the court being fully advised, it is

Ordered, that a writ of attachment be issued out of this court, directed to the United States marshal for the — District of —, commanding him to take the said — into custody and bring him before this court at — on the — day of —, 19—, to answer for the alleged contempt, and it is further

Ordered, that the said — be held to bail on said attachment in the sum of — dollars (\$—).

Date—.

United States district judge.

676. Writ of Attachment.

(Caption.)

The President of the United States of America.

To —, United States marshal for the — District of —, Greetings:

You are hereby commanded to take — into custody so that you may have his body before the District Court of the United States for the — District of —, at —, on — —, 19—, to answer for a contempt of court in that he — and have you then and there this writ with indorsement showing how you have executed the same. Admit to bail in the sum of — dollars (\$—).

[TESTE]

[SEAL]

Clerk.

677. Order Adjudging Witness Guilty of Civil Contempt and Imposing Sentence.

(Caption.)

This cause was heard on order of this court, dated — —, 19—, directing John Doe to show cause why he should not be punished for contempt for refusing to be sworn at the taking of his deposition as a witness herein, having been directed to do so by order of this court, and it appearing that the said order to show cause was duly served personally upon the said John Doe, who appeared and was represented by counsel, and the court being fully advised, it is

Adjudged, that John Doe is guilty of contempt of this court in that he failed and refused to —, although thereunto required by order duly entered herein on — —, 19—, and it is

Ordered, that the said John Doe pay a fine in the sum of — dollars (\$—), and the costs of the proceeding, and stand committed to the custody of the United States marshal until such fine and costs are paid.

Date—.

United States district judge.

678. Information Charging Criminal Contempt.

District Court of the United States

_____ District of _____

United States of America

v.

John Doe.

Criminal Contempt

No. _____

To the Honorable Judges of the District Court of the United States for the
 _____ District of _____:

Now come the United States of America by _____, United States attorney for the _____ District of _____, and in pursuance of an order of the above-entitled court, dated _____, 19____, directing the filing of this information, informs the court as follows:

1. On or about the _____ day of _____, 19____, AB commenced an action in this court to enjoin John Doe, his agents and servants from _____, and that on said date this court entered a temporary restraining order enjoining and restraining the said John Doe, his agents, and servants from _____.

2. Copies of said restraining order were duly served personally upon the said John Doe.

3. Since the issuance and service of the said restraining order and with full knowledge thereof, and while said order was in effect, the said John Doe has wilfully disobeyed and violated said restraining order, as follows: [Here state acts constituting violation of restraining order].

Wherefore, complainant prays that a warrant shall issue forthwith under order of this court for the arrest of the said John Doe and that he be brought before this court to be dealt with in accordance with law.

 United States attorney for the
 _____ District of _____.

United States of America

_____ District of _____.

I _____, United States attorney for the _____ District of _____, being sworn, say that the foregoing information is true as I verily believe.

Subscribed and sworn to before me this _____ day of _____, 19____.

 Official character.

NOTES TO DECISIONS

In General.

An information for a constructive criminal contempt may be verified on information and belief. *Creekmore v. United States* (C. C. A. 8), 237 Fed. 743,

L. R. A. 1917C, 845, cert. den. 242 U. S. 646, 61 L. ed. 544, 37 S. C. R. 240.

Formal verified complaint or affidavit was sufficient without indictment or information. *Jennings v. United States* (C. C. A. 8), 264 Fed. 399.

Affidavit held sufficient as charging a criminal contempt. *Dunham v. United States ex rel. Kansas City Southern R. Co.* (C. C. A. 5), 289 Fed. 376.

Affidavit of credible person, which is a substitute for an information by the district attorney, charging violation of a restraining order against picketing, held to charge a criminal contempt. *Reeder v. Morton-Gregson Co.* (C. C. A. 8), 296 Fed. 785.

The record must state the necessary facts showing contempt, and not mere conclusions. *Cornish v. United States* (C. C. A. 6), 299 Fed. 283.

Technical accuracy is not required in contempt proceedings, and a contention that the information is bad for duplicity is without merit. Information to which is attached an injunction order and affidavits setting forth facts constituting violation was sufficient. *Armstrong v. United States* (C. C. A. 7), 18 Fed. (2d) 371. Cert. den. 275 U. S. 534, 72 L. ed. 412, 48 Sup. Ct. 30.

Information held sufficiently to charge the promoting of a strike in violation of an injunction. *Day v. United States* (C. C. A. 7), 19 Fed. (2d) 21. Cert. den. 275 U. S. 535, 72 L. ed. 412, 48 Sup. Ct. 30.

A contempt in the presence of the court by an attorney in falsely representing that he has a right to practice does not require an affidavit supporting the charge. *Bowles v. United States* (C. C. A. 4), 50 Fed. (2d) 848. Cert. den. 284 U. S. 648, 76 L. ed. 550, 52 Sup. Ct. 29.

Contempt may be represented by information verified by the district attorney on information and belief; information held sufficiently definite and not vulnerable to the charge of duplicity. *Conley v. United States* (C. C. A. 8), 59 Fed. (2d) 929.

If the person proceeded against considers the charge too indefinite, he may apply for a bill of particulars. *Conley v. United States* (C. C. A. 8), 59 Fed. (2d) 929.

One proceeded against is entitled to notice of the charges and to opportunity for explanation and defense. *Conley v. United States* (C. C. A. 8), 59 Fed. (2d) 929.

Particularity required of an indictment is not necessary in an information upon a contempt charge. *Fanning v. United States* (C. C. A. 4), 72 Fed. (2d) 929, affg. 6 Fed. Supp. 412.

Information for contempt by juror in wilfully concealing her interest in a criminal prosecution, as a result of which she was accepted as a juror, was sufficient. *United States v. Clark* (D. C.-Minn.), 1 Fed. Supp. 747. Affd. 61 Fed. (2d) 695, 289 U. S. 1, 77 L. ed. 993, 53 Sup. Ct. 465.

No fixed formula has been prescribed for contempt proceedings and technical accuracy is not required. *United States v. French* (D. C.-Mich.), 9 Fed. Supp. 30.

If an information charging contempt is uncertain or confusing as to time or place, the remedy is by demand for a bill of particulars. *United States v. French* (D. C.-Mich.), 9 Fed. Supp. 30.

Where informations are signed by the U. S. attorney, it will be presumed that he acted on his oath as an officer of the government. *United States v. French* (D. C.-Mich.), 9 Fed. Supp. 30.

Information charging contempt for violation of an injunction was sufficient. *United States v. French* (D. C.-Mich.), 9 Fed. Supp. 30.

A party may be found guilty of contempt only upon charges clearly stated, and others must be regarded as redundant. *United States v. French* (D. C.-Mich.), 9 Fed. Supp. 30.

679. Petition to Punish for Criminal Contempt.

District Court of the United States

_____ District of _____

United States of America ex rel. _____

v.

John Doe.

Criminal Contempt

No. _____

To the Honorable Judges of the District Court of the United States for the
 — District of —:

Your petitioner — respectfully shows as follows:

1. I am the plaintiff in an action brought in this court by the service of the summons and complaint on John Doe as defendant.

2. On — —, 19—, a temporary restraining order was entered in said action restraining the said John Doe, his agents and servants, from —.

3. On — —, 19—, the said order was personally served on the said John Doe.

4. Since the service of said restraining order and while said order was in effect the said John Doe has wilfully violated the terms thereof by [here state acts constituting violation of restraining order].

Wherefore, petitioner prays that an order of attachment be entered forthwith for the arrest of the said John Doe and that he be brought before this court to be tried, as for contempt and upon conviction punished pursuant to law.

 Petitioner.

 Attorney for petitioner.

United States of America
 — District of —.

I —, attorney for petitioner, being sworn, say that the foregoing information is true as I verily believe.

Subscribed and sworn to before me this — day of —, 19—.

 Official character.

Cross-Reference.

In connection with Forms 679, 680, see
 notes to Form 678.

680. Order Adjudging Defendant Guilty of Criminal Contempt.

District Court of the United States

— District of —

United States of America

v.

John Doe.

Criminal Contempt

No. —

ORDER ADJUDGING DEFENDANT GUILTY

This matter came on to be heard this day upon the information filed herein by —, United States attorney for the — District of —, charg-

ing defendant John Doe with contempt of court, and upon the order and writ of attachment issued herein against the body of the said John Doe, and the return thereto, and after hearing evidence introduced by — and —, and the court being fully advised, the court finds that [state facts constituting the contempt], it is

Ordered and adjudged, that the defendant John Doe is guilty of contempt of court in that he —, and it is further

Ordered, that the said John Doe be fined the sum of — dollars (\$—), and be committed to jail for a period of — from this date.

Date—.

United States district judge.

Statutory Reference.

Contempt proceedings, trial, and punishment, 8 F. C. A., Title 28, § 387; U. S. C. A., Title 28, § 387; id. U. S. C.

CHAPTER 21

APPEAL

Section

1. Appeal from a District Court to the Supreme Court, Forms 690 to 700.

Section

2. Appeal to a Circuit Court of Appeals. Forms 703 to 716.

SECTION 1

APPEAL FROM A DISTRICT COURT TO THE SUPREME COURT

Form

690. Petition for direct appeal from a District Court to the Supreme Court.
691. Petition for direct appeal to Supreme Court of United States.
692. Assignment of errors.
693. Order allowing direct appeal from a District Court to Supreme Court.
694. Order allowing direct appeal to Supreme Court of the United States.

Form

695. Citation in direct appeal from a District Court to Supreme Court.
696. Stipulation for transcript of record.
697. Appellant's statement of points and designation of portions of record on appeal.
698. Statement as to jurisdiction.
699. Bond for costs on direct appeal from a District Court to the Supreme Court.
700. Supersedeas bond on direct appeal from a District Court to Supreme Court.

INTRODUCTION.—The radical changes and the welcome simplification introduced by the new rules into federal appellate procedure do not extend to direct appeals taken from the District Courts to the Supreme Court. In this class of cases the old practice remains unaffected and still prevails. A petition for appeal, assignment of errors, order allowing appeal, citation and jurisdictional statement are to be used as heretofore.

690. Petition for Direct Appeal from a District Court to the Supreme Court.

(Trial court caption.)

The petition of —, the plaintiff (defendant) herein, respectfully shows that on —, 19—, a judgment (or order, describing it) was entered herein in favor of the defendant (plaintiff) and against the plaintiff dismissing the complaint (against the defendant), in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of this plaintiff (defendant), all of which more fully appear from the assignment of errors which is filed herewith.

Wherefore, plaintiff (defendant) prays that an appeal be allowed to the Supreme Court of the United States, and that the record on appeal be made and certified and sent to the Supreme Court of the United States.

Date_____.

Attorney for_____.

Statutory References.

For Rules of Supreme Court, see 8 F. C. A., Appx. 1, pps. 588-602, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

All papers to be printed, nature and requirements of printing, Supreme Court Rule 26, 8 F. C. A., Appx. 1, p. 596, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

Appeals from District Courts; by whom allowed; supersedeas, Supreme Court Rule 36, 8 F. C. A., Appx. 1, p. 598, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

Form and requirements of bills of exceptions, Supreme Court Rule 8, 8 F. C. A., Appx. 1, p. 590, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

General provisions concerning appeals, 8 F. C. A., Title 28, §§ 861 to 880; U. S. C. A., Title 28, §§ 861 to 880; id. U. S. C.

When appeals from District Courts may be taken direct to Supreme Court, 8 F. C. A., Title 28, §§ 345, 349a, 380, 380a; U. S. C. A., Title 28, §§ 345, 349a, 380, 380a; id. U. S. C.

Writ of error abolished, 8 F. C. A., Title 28, § 861a; U. S. C. A., Title 28, § 861a, id. U. S. C.

Federal Rules of Civil Procedure.

"When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 72.

NOTE OF ADVISORY COMMITTEE TO RULE 72: "In so far as the Rules of the Supreme Court of the United States prescribe a different method to perfect a direct appeal than is prescribed in the

succeeding rule (Rule 73), there are two methods of appeal: (1) the method prescribed in this rule for a direct appeal from a district court to the Supreme Court of the United States; (2) the method prescribed in Rule 73 for an appeal from a district court to a circuit court of appeals.

"Rule 72 applies to those cases prescribed in U. S. C., Title 28, § 345 (Appellate jurisdiction from decrees of United States district courts—giving references to other statutes), and in §§ 349a (Direct appeal to Supreme Court; constitutionality of federal statutes; time; precedence) and 380a (Injunctions; constitutionality of federal statute; application for hearing; appeal to Supreme Court). See United States Supreme Court Rule 46½ [47] (Appeals Under the Act of August 24, 1937) promulgated January 10, 1938 [effective Feb. 27, 1939]. The following and similar statutes concerning direct appeals to the Supreme Court are continued in effect, subject, however, to modification by rules of the Supreme Court which may hereafter be promulgated in so far as such rules may prescribe a different method of appeal than is now provided:

"U. S. C., Title 28:

- § 861a (Writ of error abolished; substitution of appeal)
- § 861b (Statutes governing writs of error to apply to appeals)
- § 862 (Removal of causes by former writ of error)
- § 863 (Transcripts on appeal)
- § 864 (One record)
- § 868 (Citation on writ of error to district court by Supreme Court)
- § 869 (Bond in error and on appeal)
- § 870 (Same; not required of United States)
- § 872 (Writs of error returnable to Supreme Court or to circuit court of appeals)
- § 873 (Amendment of former writ of error)
- § 874 (Supersedeas)

"U. S. C., Title 28, § 832 (Suits, and so forth, by poor persons; prepayment of fees and costs) is continued."

NOTES TO DECISIONS

In General.

No appeal lies to the Circuit Court of Appeals from an order denying leave to intervene in an action by the United States under the antitrust laws, since

appeals in such cases lie directly to the Supreme Court. *United States v. Columbia Gas & Elec. Corp.* (C. C. A. 3), 108 Fed. (2d) 614.

691. Petition for Direct Appeal to Supreme Court of United States.

(Caption.)

To the Honorable —, Associate Justice, United States Court of Appeals for the District of Columbia, and the Honorable —, Chief Justice, and the Honorable —, Associate Justice, United States District Court for the District of Columbia:

— & Company, Inc., plaintiff herein, feeling itself aggrieved by the decree rendered and entered in the above-entitled cause on the — day of —, 19—, hereby appeals from the said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herein, and prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Attorneys for petitioner.

Source of Form.

Wm. Jameson & Co., Inc. v. Morgenthau, 307 U. S. 171, 83 L. ed. 1189, 59 Sup. Ct. 804.

Cross-Reference.

In connection with Forms 691 to 700, see notes to Form 690.

692. Assignment of Errors.

(Caption.)

Comes now — & Company, Inc., a corporation, plaintiff in the above-entitled cause, and files the following assignment of errors upon which it shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said cause from the decree of the District Court of the United States for the District of Columbia entered on the — day of —, 19—.

1. The District Court erred in holding that Federal Alcohol Administration Regulations No. — are within the power conferred by Congress

upon the Federal Alcohol Administrator and the Secretary of the Treasury.

* * *

2. The Court erred in dismissing plaintiff's complaint.

Wherefore, plaintiff prays that the said decree may be reversed, and for such other and further relief as to the court may seem just and proper.

Attorney for plaintiff.

Statutory Reference.

Assignment of errors required, Supreme Court Rule 9, 8 F. C. A., Appx. 1,

p. 590, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

NOTES TO DECISIONS

In General.

The assignment of errors does not require the previous settlement of the bill of exceptions, and can be formulated before that takes place. *Waldron v. Waldron*, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. 383; *Old Nick Williams Co. v. United States*, 215 U. S. 541, 54 L. ed. 318, 30 Sup. Ct. 221.

Assignments of error do not present grounds for reversal when they relate to rulings as to which no exception was taken, and require a search through the record to determine the subject of the complaint. *Matheson v. United States*, 227 U. S. 540, 57 L. ed. 631, 33 Sup. Ct. 355; *Edwards v. United States* (C. C. A. 8), 7 Fed. (2d) 357; *Black v. United States* (C. C. A. 6), 7 Fed. (2d) 469. *Cert. den.* 269 U. S. 568, 70 L. ed. 416, 46 Sup. Ct. 25.

To obtain the benefit of a consideration of a question on a statute there should be a specific assignment of error definitely pointing out the action of the court on which the complaint is made. *Findlay v. Pertz* (C. C. A. 6), 74 Fed. 681, affg. 66 Fed. 427, 29 L. R. A. 188;

Flanagan v. Benson (C. C. A. 8), 37 Fed. (2d) 69.

Notes to Decisions under Former Supreme Court Rule.

The practice of filing a large number of assignments can not be approved. It prevents the purpose sought to be observed by the rule requiring any assignments. *Phillips & Colby Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. 865, *Ann. Cas.* 1916B, 252; *Chicago Great Western R. Co. v. McDonough* (C. C. A. 8), 161 Fed. 657.

Assignment of error in appellant's brief did not comply with this rule. *Briscoe v. Rudolph*, 221 U. S. 547, 55 L. ed. 848, 31 Sup. Ct. 679.

Assignment of error which is too indefinite to present a constitutional question can not be considered, though the opposing party interposed no objection thereto. *Seaboard Air Line R. Co. v. Watson*, 287 U. S. 86, 77 L. ed. 180, 53 Sup. Ct. 32, 86 A. L. R. 174.

693. Order Allowing Direct Appeal from a District Court to Supreme Court.

(Lower court caption.)

The plaintiff herein having filed a petition for appeal to the Supreme Court of the United States from the judgment entered herein on ———, 19—, and having filed his assignment of errors, it is

Ordered, that the appeal herein to the Supreme Court of the United States be and it is hereby allowed and it is further

Ordered, that petitioner give bond in the sum of — dollars (\$—) which shall serve as a supersedeas as well as a cost bond.

Date—.

United States district judge.

694. Order Allowing Direct Appeal to Supreme Court of the United States.

(Caption.)

The appellant in the above-entitled cause, having prayed for an allowance of an appeal to the Supreme Court of the United States from the decree made and entered in the above-entitled cause by the District Court of the United States for the District of Columbia on the — day of —, 19—, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now herein ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the District of Columbia in this cause as provided by law; and it is

Further ordered that the clerk of the said court shall prepare and certify a transcript of the record, proceedings, and decree in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in the said court within 30 days of this date; and it is

Further ordered, that security for costs on appeal be fixed in the sum of — dollars (\$—).

— Associate Justice, United States Court of Appeals for the District of Columbia, —
Chief Justice, District Court of the United States for the District of Columbia, —
Associate Justice, District Court of the United States for the District of Columbia.

695. Citation in Direct Appeal from a District Court to Supreme Court.

(Caption.)

United States of America, ss.

To— Greeting:

Appellee or appellees.

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C. within — days from the date hereof, pursuant to an order allowing an appeal from the judgment of the District Court of the United States for the — District of — in an action in which — is appellant and — is appellee, to show

cause if any there be why the said judgment rendered against the said — should not be corrected.

[TESTE]

Note.

The time to be inserted is 40 days except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, and Montana, when the time is 60 days, Supreme Court Rule 10. If, however, the appeal is taken under the Act of Aug. 24, 1937, 50 Stat. 751, the time is 60 days in all cases.

Title of judge allowing the appeal.

Statutory References.

Though writs of error have been abolished, 8 F. C. A., Title 28, § 868; U. S. C. A., Title 28, § 868; *id.* U. S. C. may still apply as to issuance and signature to the citation.

Citation, form, issuance, sufficiency, Supreme Court Rule 10.

NOTES TO DECISIONS

Form and Sufficiency.

Where an appeal is not noted in open court, and at the term at which the final decree is passed, a citation is necessary, and where necessary, the law requires it to be signed by the judge. *Maryland v. Baltimore & O. R. Co.*, 3 How. (44 U. S.) 534, 11 L. ed. 714; *Villabolos v. United States*, 6 How. (47 U. S.) 81, 12 L. ed. 352; *United States v. Curry*, 6 How. (47 U. S.) 106, 12 L. ed. 363; *Baez v. Puerto Rico* (C. C. A. 1), 82 Fed. (2d) 317.

Where the citation was signed by the clerk, it was not in the manner provided by law. *United States v. Hodge*, 3 How. (44 U. S.) 534, 11 L. ed. 714.

No attorney or solicitor can withdraw his name, after he has once entered it on the record, without leave of the court; and while his name continues there, service of notice upon him is valid as if served on the party himself. *United States v. Curry*, 6 How. (47 U. S.) 106, 12 L. ed. 363.

Where a citation was addressed to MR, the wife of GB, instead of wife of CR, and was stated to have been issued at the instance of EP, as plaintiff in error,

instead of EP, trustee, there was not such a defect as would lead to misapprehension fatal to the citation. *Peale v. Phipps*, 8 How. (49 U. S.) 256, 12 L. ed. 1070.

The citation must be directed to the party on the record, and served on him, and when an officer of the state is the party prosecuting the suit for the state, the citation must be served on him. *Poydras v. Treasurer of Louisiana*, 17 How. (58 U. S.) 1, 15 L. ed. 93.

Where the citation, like papers purporting to be a writ of error, specifies no day or term at which the defendants are required to appear, and is not itself dated, the cause will be dismissed for want of jurisdiction. *Carroll v. Dorsey*, 20 How. (61 U. S.) 204, 15 L. ed. 803.

Omission of necessary parties is fatal. *Hoe v. Wilson*, 9 Wall. (76 U. S.) 501, 19 L. ed. 762.

Where a district judge was a judge of the circuit court, as such he had authority to allow an appeal and to sign the citation, even if the decree was rendered by the circuit judge. *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. 526.

696. Stipulation for Transcript of Record.

(Caption.)

It is hereby stipulated and agreed by and between the parties hereto that for the purposes of the appeal, which has been allowed herein, to the Supreme Court of the United States, the clerk is requested to prepare and forward to the clerk of the Supreme Court of the United States the

transcript of the record on appeal which shall include the following portions of the record:

1. The complaint containing an application for interlocutory and final injunction, filed in this cause — —, 19—, together with Exhibit — to — inclusive, annexed thereto, and the verification thereof by —, dated and filed — —, 19—.

* * *

It is requested that this transcript be prepared as required by law, the rules of this court and the Rules of the Supreme Court of the United States and that the same be filed in the office of the clerk of the United States Supreme Court within the time prescribed by this court in its order allowing appeal herein, or at such later date as may be designated in an order of this court enlarging and extending said time.

Dated this — day of —, 19—.

Counsel for appellant.

United States Attorney in and for the
District of Columbia, counsel for appellees.

Source of Form.

Wm. Jameson & Co., Inc. v. Morgen-thau (D. C.-D. C.), 25 Fed. Supp. 771. Revd. on grounds which do not affect the form from which the case is derived, 307 U. S. 171, 83 L. ed. 1189, 59 Sup. Ct. 804.

Statutory References.

Precipe to denote necessary portions of record; form and requirements of

record, Supreme Court Rule 10, 8 F. C. A., Appx. 1, p. 591, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

Printing record; designation of parts to be printed, Supreme Court Rule 13, 8 F. C. A., Appx. 1, p. 593, and Cumulative Pocket Supp.; U. S. C. A., Title 28, following § 354, and Cumulative Supp.

NOTES TO DECISIONS

In General.

The opinion is not part of the record, irrespective of state statutes. *Williams v. Norris*, 12 Wheat. (25 U. S.), 117, 6 L. ed. 571.

A record which shows clearly and fully the whole case upon which the court is to pass is sufficient. *McGuire v. Massachusetts*, 3 Wall. (70 U. S.) 382, 18 L. ed. 164.

Where a paper purporting to be a transcript contained only a blank form of a certificate of authentication, without the seal of the court or the signature of its clerk, the appeal could not be entertained. *Blitz v. Brown*, 7 Wall. (74 U. S.) 693, 19 L. ed. 280.

A transcript of record is sufficiently authenticated where signed by a deputy clerk in the name of and for the clerk of

the court and bearing the seal of the court. *Garneau v. Dozier*, 100 U. S. 7, 25 L. ed. 536.

The term "record" includes the process, pleadings, depositions, the testimony taken and on file at the time of filing petition and bond. *Miller v. Tobin* (C.-Ore.), 18 Fed. 609.

Notes to Decisions under Former Rule.

This rule does not require a copy of assignment of errors in the transcript where no such assignment was filed below. *Gumbel v. Pitkin*, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. 616.

"In short to get at the matter which is complained of, we must hunt through what is called a 'proposed statement on appeal and motion for a new trial' filling 30 pages of the record, with nothing in

the brief to aid us in the search. This we are unwilling to do." Benites v. Hampton, 123 U. S. 519, 31 L. ed. 260, 8 Sup. Ct. 254.

The motion papers, in connection with the record, illustrate the opinion, and

the disposition of the motion being referred to in the decree, the whole would seem to be proper parts of the record to be transcribed, within the meaning of the statute and rule. Hoe v. Kahler (C. C.-N. Y.), 27 Fed. 145.

697. Appellant's Statement of Points and Designation of Portions of Record on Appeal.

(Supreme Court caption.)

1. Comes now the appellant in the above-entitled cause, and for its statement of the points on which it intends to rely in its appeal to this court adopts the points contained in its assignments of error heretofore filed herein.

2. Appellant herein designates plaintiff's cost bond on appeal and Exhibit B attached to the return of the defendants to rule to show cause, being described in its caption as "Notice of Hearing with Reference to Proposed Distilled Spirits Misbranding and Advertising Regulations," comprising — pages of mimeographed matter, as being unnecessary for the consideration of the points herein relied upon. Appellant designates all other portions of the record as being necessary for such consideration.

Counsel for appellant.

Service of the foregoing statement on behalf of each of the appellees is acknowledged this — day of —, 19—.

Solicitor General.

Source of Form.

Wm. Jameson & Co., Inc. v. Morgenthau, 307 U. S. 171, 83 L. ed. 1189, 59 Sup. Ct. 804.

Cross-Reference.

See notes to Form 696.

698. Statement as to Jurisdiction.

Supreme Court of the United States

— & Company, Inc., — Street,
—, State of —, a corporation,
Appellant,

v.

—, Secretary of the Treasury of
the United States; —, Adminis-
trator of the Federal Alcohol Ad-
ministration; —, Commissioner of
Customs of the United States,
Appellees.

— Term, 19—
No. —

Appeal from the District Court of the United States for the
District of Columbia.

STATEMENT AS TO JURISDICTION

Filed — — —, 19—.

Comes now — & Company, Inc., appellant herein, and concurrently with the presentation of its petition for the allowance of an appeal from the District Court of the United States for the District of Columbia by a specially constituted three-judge court under Title 28, section 380a of the United States Code, to the Supreme Court of the United States, herewith and hereby presents this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the order and decree from which said appeal is taken.

The above-named appellant in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above-entitled cause and the decree of District Court denying the plaintiff's prayer for a preliminary injunction, and the final decree dismissing the plaintiff's complaint in said cause, respectfully represents:

I. STATUTE SUSTAINING JURISDICTION.

The statutory provision believed to sustain jurisdiction is Title 28, section 380a of the United States Code, and particularly the following provisions thereof:

"An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case.

"Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

II. UNITED STATES STATUTE, THE ENFORCEMENT, OPERATION AND EXECUTION
OF WHICH IS SOUGHT TO BE ENJOINED

The United States statute, the enforcement, operation, and execution of which is sought to be enjoined, is the Act of Congress of August 29, 1935, 49 Stat. 977 (U. S. C., Title 27, sections 201-212), known as the Federal Alcohol Administration Act, and particularly certain provisions of section 5 (e) thereof which read as follows: [Here insert].

III. DATE OF DECREE AND APPLICATION FOR APPEAL

The order of the aforesaid District Court denying the plaintiff's prayer for an interlocutory injunction, and the final decree of said court dismissing plaintiff's complaint were entered together in a single document dated — — —, 19—, and the application for appeal herein is presented — — —, 19—.

IV. NATURE OF THE CASE, RULINGS OF THE COURT, AND SUBSTANTIAL
QUESTIONS INVOLVED

* * *

The appellant appends hereto a copy of the opinion of the District Court delivered in this cause together with the court's findings of fact and conclusions of law.

Respectfully submitted,

Counsel for appellant.

Source of Form.

Wm. Jameson & Co., Inc. v. Morgen-
thau, 307 U. S. 171, 83 L. ed. 1189, 59
Sup. Ct. 804, revg. (D. C.-D. C.), 25 Fed.
Supp. 771.

Statutory Reference.

Jurisdictional statements, Supreme
Court Rule 12, 8 F. C. A., Appx. 1, p. 592,
and Cumulative Pocket Supp.; U. S. C.
A., Title 28, following § 354, and Cumu-
lative Supp.

Notes to Decisions under Former Rule.

If the appeal is from an interlocutory
decree of a specially constituted District
Court (8 F. C. A., Title 28, § 380; U. S.

C. A., Title 28, § 380; id. U. S. C.), the
statement must also include a showing
of the matters in which it is claimed that
the court has abused its discretion in
granting or denying the interlocutory
injunction. Alabama v. United States,
279 U. S. 229, 73 L. ed. 675, 49 Sup. Ct.
266.

Interlocutory injunction against col-
lection of state stamp tax will not be
disturbed where the evidence is not in
the record and there is no showing of
abuse of discretion. Butler v. D. A.
Schulte, Inc. (C. C. A. 5), 67 Fed. (2d)
632.

**699. Bond for Costs on Direct Appeal from a District Court to the
Supreme Court.**

Know all men by these presents, that we — as principal, and — as
surety, are held and firmly bound unto — in the sum of — dollars
(\$—) to be paid to the said —, his successors or assigns to which
payment we bind ourselves, our successors, and assigns, jointly and
severally. Sealed and signed this — day of —, 19—.

Whereas, on — —, 19—, in an action pending in the United States
District Court for the — District of — between — as plaintiff and
— as defendant, a judgment was rendered against the said — and the
said — having obtained the allowance of an appeal from said judgment
to the Supreme Court of the United States.

Now the condition of this obligation is such that if the said — shall
prosecute his appeal with effect and pay all costs if the appeal is dis-
missed or the judgment affirmed, or pay such costs as the Supreme Court
may award if the judgment is modified, then this obligation shall be void,
otherwise it shall remain in full force and effect.

Principal.

Surety.

Surety.

[Acknowledgment and justification of sureties.]

Cross-Reference.

Supersedeas bond, see notes to Form 700.

Statutory References.

Appeal bond, Supreme Court Rule 36, 8 F. C. A., Appx. 1, p. 598, and Cumula-

tive Pocket Supp.; U. S. C. A., Title 28, following § 854, and Cumulative Supp.

Bond on appeal, 8 F. C. A., Title 28, §§ 869, 870, 874; U. S. C. A., Title 28, §§ 869, 870, 874; id. U. S. C.

Suits in forma pauperis, 8 F. C. A., Title 28, § 832; U. S. C. A., Title 28, § 832; id. U. S. C.

NOTES TO DECISIONS**Form and Sufficiency.**

It is not necessary that all defendants join in the appeal bond, although all must join in the appeal. *Brockett v. Brockett*, 2 How. (43 U. S.) 238, 11 L. ed. 251.

While the better practice is to specify the term in describing the judgment in the bond, the omission of such identification is not necessarily fatal, and before dismissal, opportunity should be given to furnish new security. *New Orleans Ins. Co. v. E. D. Albro Co.*, 112 U. S. 506, 28 L. ed. 809, 5 Sup. Ct. 289; *Davis v. Wakelee*, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. 555.

Suit or action in forma pauperis under 8 F. C. A., Title 28, § 832; U. S. C. A., Title 28, § 832; id. U. S. C. *Galloway v. State Nat. Bank*, 186 U. S. 177, 46 L. ed. 1111, 22 Sup. Ct. 811; *Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. ed. 178, 25 Sup. Ct. 55.

A bond which does not run to parties in their individual names, nor show that it was approved in open court during the term the decree was rendered, nor any particular decree as appealed from, nor any citation, is insufficient. In *re Woers-hoffer* (C. C. A. 5), 74 Fed. 915.

An appeal bond is sufficient, even though signed by but one appellant, if it

has sufficient sureties and has been approved by the judge allowing the appeal. *King v. Thompson* (C. C. A. 6), 110 Fed. 319; *Swift & Co. v. Kortrecht* (C. C. A. 6), 110 Fed. 328; *Swift & Co. v. Kortrecht* (C. C. A. 6), 112 Fed. 709.

A failure to make a bond payable to all the adverse parties is not ground for dismissal, until appellant has been afforded a reasonable opportunity of curing the defect. *Blaffer v. New Orleans Water Supply Co.* (C. C. A. 5), 160 Fed. 389.

A bond for costs and damages which may be awarded on appeal is the usual form of a cost bond, and unless specified in the approval will not operate as a supersedeas. *Aetna Life Ins. Co. v. Ryan* (D. C.-N. Y.), 253 Fed. 457.

The statute does not prescribe the precise language of the bond. A substantial compliance with the statute is all that is required. *Montgomery v. American Employers Ins. Co.* (D. C.-Del.), 22 Fed. Supp. 476. *Aff'd* 101 Fed. (2d) 1005.

An appeal bond which neither sets out the nature of the action, nor the court to which the appeal is prayed, is informal but will be taken as valid. *Smith v. Walker*, Fed. Cas. No. 13123a, *Hempst.* 289.

700. Supersedeas Bond on Direct Appeal from a District Court to Supreme Court.

Know all men by these presents, that we — as principal, and — as surety, are held and firmly bound unto — in the sum of — dollars (\$—) to be paid to the said —, his successors or assigns to which payment we bind ourselves, our successors and assigns, jointly and severally. Sealed and signed this — day of —, 19—.

Whereas, on — —, 19—, in an action pending in the United States District Court for the — District of — between — as plaintiff and — as defendant, a judgment was rendered against the said — and the said — having obtained the allowance of an appeal from said judgment to the Supreme Court of the United States.

Now the condition of this obligation is such that if the said — shall prosecute his appeal with effect and satisfy the said judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the Supreme Court may adjudge and award, then this obligation shall be void, otherwise to remain in full force and effect.

Principal.

Surety.

Surety.

Cross-Reference.

Appeal bond, see notes to Form 699.

Statutory Reference.

Supersedeas bond, 8 F. C. A., Title 28, §§ 869, 870, 874; U. S. C. A., Title 28,

§§ 869, 870, 874, and Rule 36, of the Supreme Court, 8 F. C. A., Appx. 1, p. 598, and Cumulative Supp.; U. S. C. A., Title 28, following § 354, Cumulative Supp.

NOTES TO DECISIONS

Form and Sufficiency.

The defendants may all join in the writ and separate when they ask for a stay. *Ex parte French*, 100 U. S. 1, 25 L. ed. 529.

A writ of error brought by the direction of a department of the government operates as a supersedeas without bond. *Schell v. Cochran*, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. 827.

A supersedeas bond is valid though executed before the judgment sought to be reviewed, it not having been delivered until after entry of judgment. *Chateaugay Ore & Iron Co. v. Blake* (C. C. N. Y.), 35 Fed. 804.

Where a supersedeas bond is given to prosecute the appeal to effect and answer all costs and damages in the event the decree is affirmed, instead of "if it fails to make its plea good," it is insufficient. *Peace River Phosphate Co. v. Edwards* (C. C. A. 5), 70 Fed. 728.

A supersedeas bond is not improper which provides for the payment of \$500.00 per month actual damages, in the attempt of the court to do full justice without another suit, and the bond being contingent upon an affirmance of the decree. *Sinclair Ref. Co. v. Smith* (C. C. A. 5), 13 Fed. (2d) 68. *Cert. den.* 273 U. S. 725, 71 L. ed. 860, 47 Sup. Ct. 236.

Bond given by administrator, appealing from judgment against decedent, was a supersedeas bond. *United States Fidelity & Guaranty Co. v. Jones* (C. C. A. 7), 49 Fed. (2d) 559.

An appeal bond conditioned to answer all damages and costs is in itself a supersedeas and stays execution, and damages are not those sustained by reason of the delay, but include the amount of the judgment. *Louisville Trust Co. v. National Bank* (D. C.-Ky.), 3 Fed. Supp. 925.

Where a judgment is for a large amount, the court may, in its discretion, approve a supersedeas bond for less than double the amount of the judgment, having regard to the sufficiency of the security. *American Nicholson Pavement Co. v. Elizabeth*, Fed. Cas. No. 310; *Hatch v. Coddington*, Fed. Cas. No. 6205, 5 Blatchf. 523.

Appeals operate as a supersedeas without any express order to that effect, if taken within the proper time with an offer of requisite security. *Butchers Assn. v. Slaughter House Co.*, Fed. Cas. No. 2234, 1 Woods 50.

Notes to Decisions under Former Rule.

Where the judgment sought to be stayed is not for money or property, but to direct the performance of a ministerial act, this rule does not apply.

United States ex rel. Day v. New Orleans (C. C.-La.), 8 Fed. 112.

There is no doubt that a supersedeas bond, conditioned according to the statute for prosecuting an appeal with effect and answering all damages and costs, covers not merely compensation for the delay arising from the appeal, but also the amount of the decree appealed from so far as the latter directs the payment

of money by the appellants to the appellees. *Rosenstein v. Tarr* (C. C.-Mass.), 51 Fed. 368; *American Surety Co. v. North Packing & Provision Co.* (C. C. A. 1), 178 Fed. 810.

Items covered by supersedeas bond on appeal from mortgage foreclosure decree. *American Trust Co. v. Speers Sand & Clay Works, Inc.* (D. C.-Md.), 60 Fed. (2d) 994.

SECTION 2

APPEAL TO A CIRCUIT COURT OF APPEALS

Form

- 703. Notice of appeal to Circuit Court of Appeals under Rule 73 (b).
- 704. Notice of appeal to Circuit Court of Appeals from a part of the judgment.
- 705. Bond for costs on appeal.
- 706. Supersedeas bond.
- 707. Motion to extend time to file transcript of record.
- 708. Designation of portions of record to be contained in record on appeal.
- 709. Designation of record on appeal, appellee making no additional designation.

Form

- 710. Designation by appellee of additional matters to be included in record on appeal.
- 711. Statement of points.
- 712. Stipulation as to record on appeal.
- 713. Motion to dismiss appeal.
- 714. Order staying mandate of Circuit Court of Appeals.
- 715. Order remanding cause from Circuit to District Court.
- 716. Order setting aside an order dismissing complaint and granting leave to file further pleadings.

INTRODUCTION.—The momentous innovations in federal civil appellate procedure introduced by the new rules apply to appeals taken from District Courts to the Circuit Courts of Appeals. An appeal is taken merely by filing a notice to that effect with the clerk of the trial court. No allowance of the appeal is needed. The clerk mails copies of the notice of appeal to the appellees. A cost bond is also needed.

Thereafter the parties have 40 days in which to settle and file the record. Within the first 30 days of that period the appellant files a designation of the parts of the record to be included in the record on appeal. If he fails to designate the entire transcript of the trial, he must accompany the designation by a statement of the points on which he intends to rely. The appellee then has ten days to file a designation of additional matter to be included in the record. The record so prepared is filed with the Circuit Court of Appeals. The rules of the Appellate Court govern such matters as the printing of the record.

It will be observed that bills of exceptions have been abolished. Moreover, it is no longer necessary to transform the testimony into a narrative form. The old practice of summons and severance where there are several parties has likewise been abolished.

703. Notice of Appeal to Circuit Court of Appeals under Rule 73 (b).

(Caption.)

Notice is hereby given that C.D. and E.F., defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit [from the order (describing it)] [from the final judgment] entered in this action on ———, 19—.

Signed: _____

Attorney for appellants C.D. and E.F.

Address: _____

Note: "Use either the material in the first set of brackets or that in the second, as the case requires. If the appeal is from a part only of an order or judgment that part must be specified.

"Rule 73 (b) does not require the appellee to be named. It does require the clerk to notify all other parties than appellant."

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 27.

Cross-Reference.

See notes to Forms 705, 706, 708.

Statutory References.

See court rules for appropriate circuit, 8 F. C. A., Appx. 2, pp. 602-708, and Cumulative Pocket Supp.

General provisions concerning appeals, 8 F. C. A., Title 28, §§ 861 to 880; U. S. C. A., Title 28, §§ 861 to 880; id. U. S. C.

Writs of error abolished, 8 F. C. A., Title 28, § 861a; U. S. C. A., Title 28, § 861a; id. U. S. C.

Federal Rules of Civil Procedure.

"When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal." Rule 73 (a).

"The notice of appeal shall specify the parties taking the appeal; shall designate

the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing." Rule 73 (b).

"Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal." Rule 74.

NOTE OF ADVISORY COMMITTEE TO RULE 73 (a): "1. This rule prescribes the method of appeal from a district court to a circuit court of appeals. Compare the system of appeals in criminal cases, 292 U. S. 661, 662-663 (1934). To the extent to which the following statutes prescribe a different method for the taking of an appeal from the district courts to a circuit court of appeals, they are superseded:

"U. S. C., Title 28:

§ 228 (Allowance of appeals)

§ 228a (Provisions relating to appellate procedure continued in force for circuit courts of appeals)

§ 867 (Citation on former writ of error)

§ 872 (Writs of error returnable to Supreme Court or circuit courts of appeals).

"Those statutes were modified by:

"U. S. C., Title 28:

§ 861a (Writ of error abolished; substitution of appeal)

§ 861b (Statutes governing writs of error to apply to appeals).

"2. In the cases which come within the Federal Rules of Civil Procedure, this rule governs the taking of an appeal from a district court to a circuit court of appeals, in the situations provided for by statute, such as U. S. C., Title 28, § 225 (Appellate jurisdiction), Subsection (a) (Review of final decisions), Subsection (b) (Review of interlocutory orders or decrees of district courts), U. S. C., Title 28, §§ 226 (Review of judgments of district courts exercising concurrent jurisdiction with Court of Claims or adjudicating claims against the United States), 227 (Appeals in proceedings for injunctions and receivers), 227a (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting).

"See Clark, Power of the Supreme Court to make Rules of Appellate Procedure (1936), 49 Harv. L. Rev. 1303.

"3. This rule continues in effect the statutes providing for the time for taking an appeal such as:

"U. S. C., Title 28:

§ 227 (Appeals in proceeding for injunctions and receivers)

§ 230 (Time for making application for appeal).

"This supplants the petition for appeal, the order allowing an appeal, and the citation on appeal; and, in the cases to which this rule applies, supersedes U. S. C., Title 28, §§ 862 (Removal of causes by former writs of error), 872 (Writs of error returnable to Supreme Court or to circuit courts of appeals), and 867 (Citation on former writ of error), all

as modified by U. S. C., Title 28, § 861a (Writ of error abolished; substitution of appeal), and § 861b (Statutes governing writs of error to apply to appeals). It substitutes therefor the notice of appeal which is common in a great number of the code states, including Arizona, Rev. Code Ann. (Struckmeyer, 1928) § 3663; Idaho, 1 Code Ann. (1932) § 11-202; Illinois, Rev. Stat. (1937) ch. 110, § 259.33; Michigan, Court Rules Ann. (Searl, 1933) Rule 56; Minnesota, 2 Stat. (Mason, 1927) § 9492; Montana, 4 Codes Ann. (1935) § 9733; New York, C. P. A. (1937) § 562; Ohio, Code Ann. (Throckmorton, 1936) § 12223-5; Washington, 4 Rev. Stat. Ann. (Remington, 1932) § 1719; Wisconsin, Stat. (1935) § 306.02. See also United States Supreme Court Rules for appeals in criminal cases, 292 U. S. 661, 662-663, Rule III."

NOTE OF ADVISORY COMMITTEE TO RULE 73 (b): "No assignments of error need be filed in the district court, but see Rule 75 (d) (Statement of Points) for the service by the appellant of a statement of the points on which he intends to rely on the appeal. Compare the state provisions cited above. The provision regarding assignments of error contained in U. S. C., Title 28, § 862 (Removal of causes by former writ of error) as modified by U. S. C., Title 28, § 861a (Writ of error abolished; substitution of appeal) and § 861b (Statutes governing writs of error to apply to appeals) are superseded in so far as no assignments of error are required to be filed in the district court. Compare Rule 9 of the Supreme Court of the United States and the rules of the various circuit courts of appeals."

NOTE OF ADVISORY COMMITTEE TO RULE 74: "For the federal practice on summons and severance, see *Masterson v. Herndon*, 10 Wall. 416 (1870), and *Hartford Accident & Indem. Co. v. Bunn*, 285 U. S. 169 (1932). The practice of summons and severance is not common in state procedures; see *Doty v. Strong*, 1 Pinney 165, 168 (Wis., 1842)."

NOTES TO DECISIONS

How Taken [Rule 73 (a)].

When a judgment had become unappealable before the effective date of these rules, it can not be considered as pending to make the new rules applicable. Mc-

Crone v. United States, 307 U. S. 61, 83 L. ed. 1108, 59 Sup. Ct. 685, affg. (C. C. A. 9), 100 Fed. (2d) 322.

The Federal Rules of Civil Procedure have not changed the rule that the time

within which an appeal may be taken begins to run from the entry of the judgment and not from the date of the service of notice thereof upon a party. *Siegel v. Margiotta* (C. C. A. 2), 102 Fed. (2d) 525.

An order of the District Court extending the time to file the record on appeal, which is entered after expiration of time prescribed by the rules, is invalid if it does not set forth that it was made upon motion after notice and that failure to file such record within the 40-day period was the result of excusable neglect. *Ainsworth v. Gill Glass & Fixture Co.* (C. C. A. 3), 104 Fed. (2d) 83.

After notice of appeal has been timely filed, the circuit court of appeals may permit the record on appeal to be filed at any time. *Ainsworth v. Gill Glass & Fixture Co.* (C. C. A. 3), 104 Fed. (2d) 83.

An appeal from an order in bankruptcy on an application for an allowance of compensation may be maintained only if allowed by the Circuit Court of Appeals in the exercise of discretion (section 250 of the Chandler Act, 3 F. C. A., Title 11, § 650; U. S. C. A., Title 11, § 650; id. U. S. C.). *Cowan v. Dickinson Industrial Site* (C. C. A. 7), 104 Fed. (2d) 771.

Prior to February 13, 1939, the effective date of the amendment of Order 36 of the General Orders in Bankruptcy which made the Federal Rules of Civil Procedure applicable in bankruptcy proceedings, an appeal from an interlocutory decree taken both as provided by section 8 (c) of the Bankruptcy Act (3 F. C. A., Title 11, §§ 1 to 303; U. S. C. A., Title 11, §§ 1 to 303; id. U. S. C.) and this rule was proper. *Jordan v. Palo Verde Irr. Dist.* (C. C. A. 9), 105 Fed. (2d) 601.

An appeal will lie from an order dismissing for insufficiency a claim for infringement of a copyright, although a claim for unfair competition joined in the same complaint remains to be tried. *Collins v. Metro-Goldwyn Pictures Corp.* (C. C. A. 2), 106 Fed. (2d) 83.

A final judgment dismissing an action for failure to prosecute is appealable. *Dudley v. Community Public Service Co.* (C. C. A. 5), 108 Fed. (2d) 119.

An order denying summary judgment is not a final judgment and therefore is not appealable. *Jones v. St. Paul Fire*

& Marine Ins. Co. (C. C. A. 5), 108 Fed. (2d) 123.

After a case has been remanded to the District Court, motion to amend pleadings may be entertained by that court. *Jones v. St. Paul Fire & Marine Ins. Co.* (C. C. A. 5), 108 Fed. (2d) 123.

In an action on an "accidental death" clause of a life insurance policy, an order staying proceedings until plaintiff complied with an order under Rule 34 directing her to consent to exhumation of the body of the deceased, is not a final judgment so as to permit appeal therefrom after expiration of the time limited for appeals from interlocutory orders. *Zalatuka v. Metropolitan Life Ins. Co.* (C. C. A. 7), 108 Fed. (2d) 405.

In an action for infringement of two separate patents, an order dismissing the complaint as to one of them is a final decision and is, therefore, appealable. *Karl Kiefer Mach. Co. v. United States Bottlers Machinery Co.* (C. C. A. 7), 108 Fed. (2d) 469.

No appeal lies to the Circuit Court of Appeals from an order denying leave to intervene in an action by the United States under the antitrust laws, since appeals in such cases lie directly to the Supreme Court. *United States v. Columbia Gas & Elec. Corp.* (C. C. A. 3), 108 Fed. (2d) 614.

Appeals may be taken in a number of companion cases by a single notice of appeal, naming all appellants and signed by the attorneys for all of them, although it is better practice to file a separate notice of appeal in each case. *St. Marie v. United States* (C. C. A. 9), 108 Fed. (2d) 876.

An order refusing to remit the forfeiture of an appearance bond in a criminal case which disposes of petitioner's right to remission and with regard to which no further proceedings can be had is a final order and therefore appealable. *Isgrig v. United States* (C. C. A. 4), 109 Fed. (2d) 131.

A party desiring to prosecute in forma pauperis an appeal in a habeas corpus proceeding must apply for such privilege to the District Court before filing a notice of appeal. If the application is denied for any reason other than lack of good faith, it may be presented to the Circuit Court of Appeals. *Smith v. Johnston* (C. C. A. 9), 109 Fed. (2d) 152.

Notice of Appeal [Rule 73 (b)].

Where the filing of a waiver of service by appellee and the appearance of appellee to the appeal had taken place within the time fixed for the filing of notice of appeal, the filing of a notice of appeal after the expiration of such time must be disregarded as surplusage. *Crump v. Hill* (C. C. A. 5), 104 Fed. (2d) 36.

The court of appeals may consider only that portion of the judgment or order which is designated in the notice of appeal, if the appeal is taken only from a part of the judgment. *Carter v. Powell* (C. C. A. 5), 104 Fed. (2d) 428.

A notice of appeal is sufficient even though it reverses the names of the parties in the description of the judgment, if it contains sufficient information to acquaint the appellee of the identity of the judgment appealed from. *Martin v. Clarke* (C. C. A. 7), 105 Fed. (2d) 685.

Failure to file a cost bond on appeal does not affect the validity of the appeal. *St. Marie v. United States* (C. C. A. 9), 108 Fed. (2d) 876.

In a notice of appeal in an action against a bank and its receiver in which there is a change of receivers subsequently to the commencement of the action, the new receiver need not be named as appellee, unless there has been a substitution of parties. *Myers v. Can-*

ton Nat. Bank (C. C. A. 7), 109 Fed. (2d) 31.

Summons and Severance.

The provisions of this rule held not applicable in a case in which the order appealed from was entered July 2, 1938, and the time for appeal expired prior to September 16, 1938. *Tighe v. Maryland Casualty Co.* (C. C. A. 9), 99 Fed. (2d) 727.

The former rule relating to summons and severance should be applied to an appeal taken prior to the effective date of the new rules. *Tighe v. Maryland Casualty Co.* (C. C. A. 9), 99 Fed. (2d) 727; *Standard Acc. Ins. Co. v. United States ex rel. Stringille* (C. C. A. 1), 103 Fed. (2d) 501.

In an action against two joint tortfeasors, a verdict was directed in favor of one defendant, and a verdict was rendered by the jury against the other defendant. The plaintiff appealed, assigning as error the direction of the verdict in favor of the first defendant. The rendition of judgment against the second defendant does not bar right to prosecute appeal as against the first, especially in the light of this rule abolishing summons and severance. *Schaffer v. Pennsylvania R. Co.* (C. C. A. 7), 101 Fed. (2d) 369.

704. Notice of Appeal to Circuit Court of Appeals from a Part of the Judgment.

(Caption.)

Notice is hereby given that CD, defendant above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from that part of the final judgment entered in this action on ———, 19——, which provides as follows:

Filed——.

Attorney for appellant CD.

Address.

Cross-Reference.

See notes to Form 703.

705. Bond for Costs on Appeal.

Know all men by these presents, that I ——— as principal, and ——— as surety, are held and firmly bound unto ———, in the sum of ——— dollars

(§——) to be paid to the said ——, his attorney, successors, or assigns to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this —— day of ——, 19——.

Whereas on —— ——, 19——, in an action in the District Court of the United States for the —— District of ——, between —— plaintiff and —— defendant, a judgment was rendered against the said —— and the said —— has duly filed a notice of appeal from said judgment.

Now, the condition of this obligation is that if the said —— shall prosecute his appeal with effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

[Acknowledgment.]

[Justification of sureties.]

Signatures.

Cross-References.

See notes to Forms 699, 706.

Advisory notes to Rule 73, see Form 703.

Statutory References.

Appeals in forma pauperis, 8 F. C. A., Title 28, § 832; U. S. C. A., Title 28, § 832; id. U. S. C.

Bond on appeal, 8 F. C. A., Title 28, §§ 869, 870, 874; U. S. C. A., Title 28, §§ 869, 870, 874; id. U. S. C.

Federal Rules of Civil Procedure.

"Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk." Rule 73 (c).

"If a bond on appeal or a supersedeas bond is not filed within the time speci-

fied, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court." Rule 73 (e).

"By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known." Rule 73 (f).

NOTE OF ADVISORY COMMITTEE TO RULE 73 (c): "The first sentence leaves unaffected the bond provisions of U. S. C., Title 28, §§ 832 (Suits, and so forth, by poor persons; prepayment of fees and costs), 869 (Bond in error and on appeal), 870 (Bond in error and on appeal; not required of United States). This rule does not affect the additional bond as a condition of appeal which may be required by U. S. C., Title 28, § 227 (Appeals in proceedings for injunctions and receivers). As to the amount of the bond, the rules of the circuit courts of

appeals provide as follows: Second Circuit—§250, Rule 12; the other circuits leave the amount of the bond to be fixed by the district court. This rule supersedes all such provisions of circuit court rules in the cases to which it applies. U. S. C., Title 6, § 6 (Surety companies as sureties) is modified in so far as it may require approval of a \$250 bond on appeal. As to the method of accepting bonds, compare N. Y. C. P. A. (1937) § 566; 2 Minn. Stat. (Mason, 1927) § 9499."

NOTE OF ADVISORY COMMITTEE TO RULE 73 (e): "This is incorporated to make clear the extent of the jurisdiction of the district court to entertain motions for failure to file or for insufficiency of a bond on appeal or a supersedeas bond."

NOTE OF ADVISORY COMMITTEE TO RULE 73 (f): "Compare U. S. C., Title 29, § 107 (Issuance of injunctions in labor

disputes; undertakings) which is continued by this rule in so far as it is applicable to a bond on appeal or a supersedeas bond. This subdivision provides a remedy in addition to any other remedies against sureties, such as those provided in U. S. C., Title 6 (Official and Penal Bonds). U. S. C., Title 6 contains complete provisions for surety companies on federal bonds, providing for qualified surety companies, § 6 (Surety companies as sureties); for the appointment of process agents, § 7 (Appointment of agents; service of process); for conditions upon which the Secretary of Treasury shall grant authority to do business, § 8 (Deposit of charter); for quarterly statements to be filed with Secretary of the Treasury, § 9 (Quarterly Statements); for jurisdiction of actions on bonds (Jurisdiction of suits on bonds); and various other provisions, §§ 11-15."

706. Supersedeas Bond.

Know all men by these presents, that I — as principal, and — as surety, are held and firmly bound unto —, in the sum of — dollars (\$—) to be paid to the said —, his attorney, successors, or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this — day of —, 19—.

Whereas, on — —, 19— in an action in the District Court of the United States for the — District of —, between — plaintiff and — defendant, a judgment was rendered against the said — and the said — has duly filed a notice of appeal from said judgment.

Now, the condition of this bond is, that if the said — shall prosecute his appeal with effect and satisfy the said judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full or such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award then this obligation to be void, otherwise to remain in full force and effect.

[Signatures and seals.]

[Acknowledgment.]

[Justification of Sureties.]

Approved this — day of —, 19—.

United States district judge.

Cross-Reference.

See notes to Forms 699, 700, 705.

Statutory Reference.

Supersedeas bonds, 8 F. C. A., Title 28, §§ 869, 870, 874; U. S. C. A., Title 28, §§ 869, 870, 874; id. U. S. C.

Federal Rules of Civil Procedure.

"Whenever an appellant entitled there- to desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security

other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay." Rule 73 (d).

NOTE OF ADVISORY COMMITTEE TO RULE 73 (d): "This modifies U. S. C., Title 28, § 874 (Supersedeas). Provisions have been here added for giving the district court power to ameliorate the possible harshness of the present rules in proper cases. Compare Rule 36 of the Supreme Court of the United States and the rules of the various circuit courts of appeals."

NOTES TO DECISIONS**In General.**

Rule 81 (a) (2) which makes the Federal Rules of Civil Procedure applicable to appeals in habeas corpus proceedings does not extend to such proceedings the provisions of this rule. The question of

custody of a prisoner pending appeal in a habeas corpus proceeding is still governed by Rule 45, par. 2, of the Rules of the Supreme Court. United States ex rel. Bowers v. Dishong (D. C.-Fla.), 9 Bull. 19.

707. Motion to Extend Time to File Transcript of Record.

(Caption in District Court.)

Appellant moves this court that he be granted until ————, 19—, to file the transcript of record on appeal in this action.

Date——.

Attorney for appellant.

Cross-Reference.

See notes to Form 708.

708. Designation of Portions of Record to be Contained in Record on Appeal.

(Caption in District Court.)

Appellant designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Complaint.
2. Motion to dismiss.

3. Order denying motion to dismiss.
4. Answer.
5. Plaintiff's motion for bill of particulars.
6. Order granting motion for bill of particulars.
7. Defendant's bill of particulars.
8. Transcript of the evidence [or annexed portions of transcript of the evidence].
9. Plaintiff's motion for directed verdict.
10. Order denying motion for directed verdict.
11. Verdict of the jury.
12. Plaintiff's motion for new trial.
13. Order denying motion for new trial.
14. Opinion.
15. Judgment.
16. Notice of appeal.
17. This designation.
18. Designation by appellee of additional matters to be included in the record.
19. Statement of points upon which appellant intends to rely on appeal.

Date_____.

Attorney for appellant.

Address.

Note.

Statement 19 is needed only if appellant fails to designate entire record and all proceedings and evidence in the case, Rule 75 (d).

Cross-Reference.

See notes to Form 703.

Federal Rules of Civil Procedure.

"The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous

order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." Rule 73 (g).

"Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included." Rule 75 (a).

"If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the

appellant fails to do so the court on motion may require him to furnish the additional parts needed. One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record." Rule 75 (b).

"Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof." Rule 75 (c).

"If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal." Rule 75 (d).

"All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties." Rule 75 (e).

"Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal." Rule 75 (f).

"The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of

law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals." Rule 75 (g).

"It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court." Rule 75 (h).

"Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper." Rule 75 (i).

"If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose." Rule 75 (j).

"When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication." Rule 75 (k).

"What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the circuit court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court." Rule 75 (l).

"When the questions presented by an appeal to a circuit court of appeals can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal." Rule 76.

NOTE OF ADVISORY COMMITTEE TO RULE 73 (g): "Compare the rules of the various circuit courts of appeals. The first, second, third, fifth, sixth, seventh, and ninth circuits allow 30 days for the docketing of the case, while those of the fourth, eighth, and tenth circuits allow 40 days."

NOTE OF ADVISORY COMMITTEE TO RULE 75 (a) (b): "This rule applies only to appeals to a circuit court of appeals, and not to the direct appeal from the district court to the Supreme Court of the United States provided for in Rule 72. Compare Equity Rule 75 (Record on Appeal—Reduction and Preparation), Equity Rule 76 (Record on Appeal—Re-

duction and Preparation—Costs—Correction of Omissions).

"This rule continues U. S. C., Title 28, § 764 (Opinion, findings, and conclusions in action against United States) in so far as that statute relates to the record on appeal, and supersedes U. S. C., Title 28, § 776 (Bill of exceptions; authentication; signing of by judge). The following statutes are modified in so far as they prescribe a different record:

"U. S. C., Title 28:

§ 862 (Removal of causes by former writ of error)

§ 863 (Transcript on appeals)

§ 865 (Printed transcript of record on appeal to circuit court of appeals)

§ 866 (Printed record as part of transcript on appeal to Supreme Court)

Compare Rules 8 and 10 of the Supreme Court of the United States and rules of the various circuit courts of appeals.

"Compare U. S. C., Title 28, § 864 (One record) with the provision in the rule for a single record."

NOTE OF ADVISORY COMMITTEE TO RULE 75 (c): "This rule does not require the narrative form of record nor does it forbid its use. It allows a party to offer a narrative statement and permits his adversary to reject it and substitute question and answer form. The narrative form of testimony has been adversely criticized by the bar, by a considerable section of the bench, and by commentators. For a discussion of this topic, see Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929), 42 Harv. L. Rev. 483; Lane, *Twenty Years Under the Federal Equity Rules* (1933), 46 Harv. L. Rev. 638, as well as the earlier articles by Lane, which are cited therein; Stone, *The Record on Appeal in Civil Cases*, 23 Va. L. Rev. 766 (1937); Hopkins, *Federal Equity Rules* (8th ed., 1933), 307, n. 1. The only states which still require the narrative form to be used as in Equity Rule 75 (b) are: Alabama, (limited to bills of exception) Cir. Court Rule 32 (Ala. Code Ann. (Michie, 1928) p. 1939), *Turner v. Thornton*, 192 Ala. 98, 68 So. 813 (1915), *Lone Star Cement Co. of La. v. Wilson*, 231 Ala. 83, 163 So. 601 (1935); Arizona, Supreme Court Rule iv (1), (7) (1928) (bills of exception, depositions, statements of facts; but with alternative

provision for reporter's transcript, Supreme Court Rule iv (1), (13); Ariz. Rev. Code Ann. (Struckmeyer, 1928) §§ 3863-3869); Florida, Special Rule 1, Circuit Court Rules at Law, 5 Comp. Gen. Laws (1927) p. 4645-6 (with discretion to trial court to order otherwise); Massachusetts, (bills of exception; compare Cornell-Andrews etc. Co. v. Boston & Providence R. R., 215 Mass. 381, 387 (1913) and Taylor v. Pierce Bros. Ltd., 219 Mass. 187 (1914) which indicate that the courts favor a narrative form as opposed to question and answer form); Missouri, (parol evidence in equity cases) Sup. Ct. Rule 7 (1934); Montana, Sup. Ct. Rule vii (1931); North Carolina, Supreme Ct. Rule 19 (4) (N. C. Code Ann. (1935) Appendix VII, p. 2668). Minnesota (Rule 8 (2) Sup. Ct., 2 Minn. Stat. (Mason, 1927) p. 2118) and Missouri (in law when the parties disagree, Sup. Ct. Rule 6 1934) allow the narrative form optionally.

"Of the forty-two or forty-three states which do not require the narrative form of record, the division is about equal between (1) those which require that a transcript of the entire evidence, as taken by the stenographer, be inserted in the record on appeal so far as it relates to the errors relied upon; for example, Michigan, Court Rules Ann. (Searl, 1933) Rules 66 (3) and 66 (7); New York, C. P. A. (1937) § 576; Ohio, Code Ann. (Throckmorton, 1936) § 12223-8, 12223-32; Wyoming, Rev. Stat. (1931) § 89-4905, and (2) those which permit the full stenographic transcript of relevant evidence to be used in the record on appeal at the option of one of the parties or the court; for example, California, Code Civ. Proc. (Deering, 1937) § 953a; Illinois, Rev. Stat. (1937) ch. 110, § 259.36 (1) (c), (d); Missouri, 1 Rev. Stat. (1929) § 1033; South Carolina, Code (Michie, 1932), Sup. Ct. Rule 2, p. 1272."

NOTE OF ADVISORY COMMITTEE TO RULE 75 (1): "Some confusion exists as to whether the district courts or the circuit courts of appeals shall supervise the printing of records for the circuit courts of appeals. This arises because of the Act of February 13, 1911 (c. 47, 36 Stat. 901; U. S. C., Title 28, §§ 865, 866), which provides that on appeal to the circuit court of appeals from a final judgment, the appellant shall cause the record to be printed 'under such rules as the lower

court shall prescribe'. This seems to give the district court charge of the printing of the record. In some of the circuit courts of appeals the clerks claim the right to supervise the printing of the record. In the Circuit Court of Appeals of the Second Circuit, there is a rule (Rule XXI) that in cases covered by the Act of February 13, 1911, (appeals from final judgments) the appellant shall cause the record to be printed, (presumably under the rules of the district court), but in other classes of appeals the printing shall be supervised by the clerk of the court of appeals. The Advisory Committee felt obliged to deal with this subject because the Act of February 13, 1911 purports to impose some powers and duties on the district courts in respect of printing records on appeal. The Advisory Committee concluded that the district courts should have nothing to do with the Supervision of printing in the upper courts; so it is provided in Subdivision (1) of Rule 75 that this subject shall be governed by the rules of the court to which the appeal is taken.

"If the rule had stopped there the result would have been to supersede the provision in the Act of February 13, 1911 which provides that printed records in the circuit courts of appeals from final judgments of district courts shall be 'in such form as the Supreme Court of the United States shall by rule prescribe'. The desire to preserve this authority in the Supreme Court explains the presence in Subdivision (1) of the provision to that effect. This power in the Supreme Court does not seem to have been exercised. Its purpose was to enable the Supreme Court to prescribe the form of type and dimensions of printed matter in printed records in the circuit courts of appeals so that extra copies of those records might be used in the Supreme Court without reprinting. Rules of the Supreme Court (13 and 26) now provide that in cases of appeals to the Supreme Court or where the record below is reprinted for the use of the Supreme Court, the work shall be done under the supervision of the clerk and the size of type and dimensions of printed matter are specified. On the other hand, Supreme Court Rule 38, relating to review on certiorari provides in paragraph 7, that when certiorari is granted, it is permissible to use printed copies of the record

'as printed below'. Printed records in the respective United States circuit courts of appeals are not uniform and do not always conform to the rules of the Supreme Court respecting the dimensions of printed matter or of size of type or spacing between lines.

"It will be noted that there is nothing in this rule or in the present rules of the Supreme Court which prevent the use of printed exhibits. It is customary in patent cases to insert in the record printed copies of patents, as they come from the government printing office and that practice may be continued.

"Consideration was given by the Committee to the question whether in the circuit courts of appeals the supervision of printing and the designation of printers should be in the hands of the clerk of that court or whether appellants should be allowed to take charge of the printing and make their own arrangements therefor, subject to rules as to the

form of the print. There has been some complaint from lawyers that printing done under the supervision of clerks costs substantially more than where the parties engage their own printers. This is a problem outside of the province of district court rules and should be settled by the rules of the appellate courts. The question whether the records in the circuit courts of appeals should be printed or cases heard on typewritten records is also a matter to be settled by the rules of the appellate courts. As this rule is drawn any United States circuit court of appeals which is willing to hear an appeal on a typewritten record may do so by requiring appellant to furnish sufficient typewritten copies of the record on appeal."

NOTE OF ADVISORY COMMITTEE TO RULE 76: "Compare Equity Rule 77 (Record on Appeal—Agreed Statement). Its provisions are adopted with appropriate modifications to conform to these rules."

NOTES TO DECISIONS

Designation of Contents of Record on Appeal [Rule 75 (a)].

Failure by appellant to file a designation of the contents of the record on appeal or to file a statement of the points on which he intends to rely is ground for dismissal of the appeal. *Leimer v. State Mut. Life Assur. Co.* (C. C. A. 8), 107 Fed. (2d) 1003.

Whether a party on appeal has requested incorporation in the record of matter which is not essential to the appeal should be decided by the Appellate Court, which has the means to discourage such conduct by withholding or imposing costs. *Cloud v. McLean-Arkansas Lbr. Co.* (D. C.-Ark.), 28 Fed. Supp. 623.

Docketing and Record on Appeal [Rule 73 (g)].

Appeal dismissed for failure to comply with this rule. *Wendel v. Hoffman* (C. C. A. 3), 104 Fed. (2d) 56.

Before the expiration of the 90-day period for filing the record on appeal as extended by order of the District Court, appellant filed a partial record only and after the expiration of such period, obtained an ex parte order from the court of appeals granting a further extension of time in which to file the complete record. The appellee moved to dismiss

the appeal. Motion should be denied. *Leimer v. State Mut. Life Assur. Co.* (C. C. A. 8), 106 Fed. (2d) 793.

The Circuit Courts of Appeals are without authority to grant a motion for a new trial on the ground that appellant is unable to procure a complete record due to the incapacity of the court reporter to furnish a transcript. Such a motion should be made to the trial court prior to appeal. *Leimer v. State Mut. Life Assurance Co.* (C. C. A. 8), 106 Fed. (2d) 793.

A Circuit Court of Appeals may not grant leave to file in the court below a bill in the nature of a bill of review before rendition of judgment by the Appellate Court. *Leimer v. State Mut. Life Assurance Co.* (C. C. A. 8), 106 Fed. (2d) 793.

The cost of printing unnecessary portions of a record on appeal should be taxed against the party requesting it. *United States v. Columbia Gas & Elec. Corp.* (C. C. A. 3), 108 Fed. (2d) 614.

Service by appellant of a designation of the record on the 38th day of the 40-day period within which the record must be filed with the Appellate Court is too late, since it does not afford appellee the ten days provided by the rules within which to file a counter-designation. In

re Prudence Co., Inc. (D. C.-N. Y.), 29 Fed. Supp. 630.

Appellant may not secure certification of the record in accordance with the designation which he has filed without regard to any counter-designation which might be filed by appellee. In re Prudence Co., Inc. (D. C.-N. Y.), 29 Fed. Supp. 630.

Questions regarding the validity and adequacy of a record on appeal should be determined by the circuit court of appeals rather than the District Court. In re Prudence Co., Inc. (D. C.-N. Y.), 29 Fed. Supp. 630.

The 40 days within which to file the record on appeal begin to run from the date of the actual filing of the notice of appeal and not from some other date appearing in the date line of the notice. In re Guanajuato Reduction & Mines Co. (D. C.-N. J.), 29 Fed. Supp. 789.

Since appellee is entitled to ten days after designation of record by appellant within which to file his counter-designation, an application by appellant for an extension of the time to file the record so as to allow appellee such ten days' period may be allowed by the District Court. In re Taltavull's Estate (D. C.-D. C.), 1 Fed. R. Dec. 128.

Enlargement [Rule 6 (b)].

An order of the District Court extending the time to file the record on appeal, which is entered after expiration of time prescribed by the rules, is invalid if it does not set forth that it was made upon motion after notice and that failure to file such record within the 40-day period was the result of excusable neglect. Ainsworth v. Gill Glass & Fixture Co. (C. C. A. 3), 104 Fed. (2d) 83.

Form of Testimony [Rule 75 (c)].

Rule 50 does not abolish but emphasizes the necessity of a motion for a directed verdict to raise the legal question as to the sufficiency of the evidence. Baten v. Kirby Lbr. Corp. (C. C. A. 5), 103 Fed. (2d) 272.

On appeal from a judgment in an action tried before the effective date of the new rules, a complete typewritten transcript of the evidence was filed in the Circuit Court of Appeals. Motion to dismiss appeal for failure to print should be denied, as appellant had not moved for a directed verdict and therefore no question as to the sufficiency of the evi-

dence had been properly raised. Baten v. Kirby Lbr. Corp. (C. C. A. 5), 103 Fed. (2d) 272.

Power of Court to Correct Record [Rule 75 (h)].

Motion to have supplemental and corrected record was denied where there was no dispute as to any essential matter of record not in the transcript. Speer v. Rural Special School Dist. No. 50 (C. C. A. 8), 100 Fed. (2d) 202.

On an appeal from a judgment granting a writ of habeas corpus in a deportation proceeding, in which the appeal was taken and briefs on both sides filed before the effective date of the new rules, but which came on for decision after such effective date, the court, of its own motion, issued an order to show cause why all the relevant evidence should not be brought before the court pursuant to this rule. After hearing on the rule, the court held that it would not be feasible within Rule 86 to apply the new rules to further proceedings in the Appellate Court. Harris v. Biskowicz (C. C. A. 8), 100 Fed. (2d) 854.

Where the parties in an automobile collision case assumed that the son of the plaintiff was negligent in the way he drove the automobile in which she was riding when injured, the Circuit Court of Appeals will adopt such assumption although the verdict of the jury does not necessarily show it to be true, since under this rule the record may be supplemented and corrected. Traglio v. Harris (C. C. A. 9), 104 Fed. (2d) 439, affg. 24 Fed. Supp. 402.

If the parties on appeal do not agree as to whether the record truly discloses what occurred in the District Court and there is an honest difference of opinion or memory between the appellant and the trial judge, the court's version must be accepted and the appeal will be dismissed unless appellant presents a record bearing the approval of the judge. Clawans v. White, — App. D. C. —, 112 Fed. (2d) 189.

Printing [Rule 75 (l)].

On appeal from a judgment in an action tried before the effective date of the new rules, a complete typewritten transcript of the evidence was filed in the Circuit Court of Appeals. Motion to dismiss appeal for failure to print should be denied, as appellant had not moved for a directed verdict and there-

fore no question as to the sufficiency of the evidence had been properly raised. *Baten v. Kirby Lbr. Corp.* (C. C. A. 5), 103 Fed. (2d) 272.

Record for Preliminary Hearing in Appellate Court [Rule 75 (j)].

A motion in the court of appeals to docket and dismiss an appeal should not be made until the clerk of the District Court has certified a sufficient portion of the record to enable the Appellate Court to determine whether the appeal was actually taken, and, if taken, whether it should be docketed, and, if docketed, whether it should be dismissed. *Lynch v. Durfey* (C. C. A. 9), 108 Fed. (2d) 181.

Record to Be Prepared by Clerk—Necessary Parts [Rule 75 (g)].

In the absence from the record on appeal of the evidence upon which the case was decided and of findings of fact in an action tried without a jury, no review thereof may be had and the case may be reversed and remanded for further proceedings. *Fogle v. General Credit, Inc.*, — App. D. C. —, 110 Fed. (2d) 128.

Statement of Points [Rule 75 (d)].

An appeal should not be dismissed for failure to file an assignment of errors or statement of points to be relied on if the general propositions relied on for reversal may be determined from the record. *Missouri ex rel. De Vault v. Fidelity & Casualty Co.* (C. C. A. 8), 107 Fed. (2d) 343.

Circuit court of appeals for the eighth circuit withdraws statement contained in a prior opinion in the same case to the effect that it has no power to order a new trial on the ground that appellant is unable to procure a complete record due to the incapacity of the court reporter to furnish a transcript. The question is left open for future determination. *Leimer v. State Mut. Life Assurance Co.* (C. C. A. 8), 107 Fed. (2d) 1003.

Transcript [Rule 75 (b)].

The transcript of the record on appeal in a case removed from a state court should contain the removal proceedings, even though no appeal is taken from the order denying motion to remand. *Cloud v. McLean-Arkansas Lbr. Co.* (D. C.-Ark.), 28 Fed. Supp. 623.

709. Designation of Record on Appeal, Appellee Making No Additional Designation.

(Caption.)

The clerk will please prepare the record on appeal herein and include the following:

1. Complaint, filed — — —, 19—.
2. Temporary restraining order. Bond fixed. Bond approved — — —, 19—.
3. Motion to dismiss, filed — — —, 19—.
4. Amended complaint, filed — — —, 19—.
5. Final order dismissing complaint entered — — —, 19—.
6. Notice of appeal filed — — —, 19—, and order fixing cost bond on appeal.
7. Order of — — —, 19—, continuing injunction pending appeal.
8. Memorandum injunction undertaking approved and filed — — —, 19—.
9. Statement of points on which appellant intends to rely.

10. This designation.

Attorney for plaintiff.

The defendants have no additional designation.

Attorney for defendant.**Cross-Reference.**

In connection with Forms 709 to 716,
see notes to Form 708.

710. Designation by Appellee of Additional Matters to be Included in Record on Appeal.

(Caption in District Court.)

Appellee designates the following additional matters to be contained in the record on appeal:

1. _____.
2. _____.
3. _____.

Attorney for appellee.

Date_____.

Address.**711. Statement of Points.**

(Caption in District Court.)

The appellant states that the points upon which he intends to rely on the appeal in this action are as follows:

1. _____.
2. _____.
3. _____.

Attorney for appellant.**Note.**

Such a statement is required only if
appellant fails to designate the complete

record and all proceedings and evidence,
Rule 75 (d).

712. Stipulation as to Record on Appeal.

(Caption in District Court.)

It is hereby stipulated by the attorneys for the respective parties hereto that the following shall constitute the transcript of record on appeal:

1. _____.

- 2. _____.
- 3. _____.

Attorney for appellant.

Date_____.

Attorney for appellee.

713. Motion to Dismiss Appeal.

Circuit Court of Appeals of the United States
— Circuit

AB,	}	Motion to dismiss
Appellant,		
v.		
CD,	}	
Appellee.		

Appellee moves the court to dismiss the appeal herein on the following grounds:

- 1. _____.
- 2. _____.
- 3. _____.

Attorney for appellee.

Address.

NOTICE

To_____

Attorney for appellant.

Address.

Please take notice that on _____, 19—, at the opening of court or as soon thereafter as counsel can be heard, the above motion will be submitted to the court.

Date_____.

Attorney for appellee.

Address.

714. Order Staying Mandate of Circuit Court of Appeals.

(Caption.)

On motion of counsel for —, appellants in the above-entitled cause, for a stay of the mandate herein, and good reasons appearing therefore;

It is ordered, that the issuance of the mandate of this court in the above-entitled cause be, and the same hereby is, stayed pending the filing of a petition by appellants in the Supreme Court of the United States for a writ of certiorari to this court, and thereafter until the final disposition of this cause by the Supreme Court, provided said petition for certiorari is filed in said Supreme Court on or before the — day of —, 19—.

Date—.

United States circuit judge.

715. Order Remanding Cause from Circuit to District Court.

(Caption.)

This cause came on to be heard on the motion of —, one of the appellants, that the said cause be remanded to the United States District Court for the — District of — to the end that that court may reconsider its decision herein dated the — day of —, 19—, in the light of — it is

Ordered, that said cause be remanded to the said District Court to the end that that court may reconsider its said decision in the light of — and may take such further action as may be appropriate. Let mandate issue forthwith.

Date—.

Senior circuit judge.

716. Order Setting Aside an Order Dismissing Complaint and Granting Leave to File Further Pleadings.

(Caption.)

Upon consideration of the order of the United States Court of Appeals for the — Circuit, entered — —, 19—, and this day filed herein remanding this cause to this court with directions to set aside the final order entered by this court dismissing the complaint, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days and with leave to plaintiff to amend or supplement its complaint within ten days thereafter, it is

Ordered, that the order of this court entered on — —, 19—, dismissing the complaint, be, and the same is hereby, set aside and vacated and it is further

Ordered, that the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby granted leave to amend or supplement its complaint within ten days thereafter.

Date—.

United States district judge.

PART TWO

CRIMINAL ACTIONS

CHAPTER 22

CRIMINAL PROCEDURE

Form

- 725. Complaint.
- 726. Warrant of arrest.
- 727. Information.
- 728. Information accompanied by plea of guilty.
- 729. Indictment in one count.
- 730. Indictment containing more than one count—Using the mails to defraud.
- 731. Indictment under Internal Revenue Laws—Failure to pay special tax.
- 732. Indictment under Internal Revenue Laws relative to intoxicating liquors.
- 733. Indictment for illegally procuring certificate of naturalization.
- 734. Indictment for perjury.
- 735. Indictment for selling liquor without payment of tax.
- 736. Indictment for counterfeiting coin.
- 737. Indictment for smuggling.
- 738. Indictment for smuggling opium.
- 739. Indictment for selling liquor to Indians.
- 740. Indictment for conspiracy.
- 741. Application for warrant of removal.
- 742. Warrant of removal.
- 743. Bench warrant.
- 744. Capias.
- 745. Recognizance.
- 746. Bail piece.
- 747. Search warrant.
- 748. Motion to quash search warrant.
- 749. Motion to suppress evidence.
- 750. Order suppressing evidence.
- 751. Plea in abatement.
- 752. Motion to quash indictment charging conspiracy.
- 753. Motion to quash indictment on various grounds.

Form

- 754. Motion to quash indictment charging perjury.
- 755. Order quashing indictment.
- 756. Demurrer.
- 757. Demurrer to indictment charging perjury.
- 758. Demurrer to indictment charging conspiracy.
- 759. Order sustaining demurrer to indictment.
- 760. Plea of guilty.
- 761. Plea in bar (former conviction or acquittal).
- 762. Plea of former jeopardy.
- 763. Plea in bar (Pardon).
- 764. Plea in bar (Statute of limitations).
- 765. Subpoena.
- 766. Motion for new trial.
- 767. Motion for new trial for newly-discovered evidence.
- 768. Order granting motion for new trial.
- 769. Judgment and commitment.
- 770. Motion in arrest of judgment.
- 771. Order granting motion in arrest of judgment.
- 772. Notice of appeal in criminal case (To be used on appeals to the United States Circuit Court of Appeals).
- 773. Notice of appeal in criminal case (To be used on appeals to the United States Court of Appeals for the District of Columbia).
- 774. Supersedeas bond.
- 775. Order extending time to settle and file bill of exceptions.
- 776. Bill of exceptions.
- 777. Precipe in criminal action.

INTRODUCTION.—District Courts of the United States are given jurisdiction "of all crimes and offenses cognizable under the authority of the United States." 7 F. C. A., Title 28, § 41 (2); U. S. C. A., Title 28, § 41 (2); id. U. S. C.

Crimes and offenses defined in the United States Criminal Code are within the jurisdiction of the District Courts of the United States as pre-

scribed by the subdivision of section 41 of Title 28 just quoted. 7 F. C. A., Title 18, § 546; U. S. C. A., Title 18, § 546; id. U. S. C.

But nothing in the United States Criminal Code takes away or impairs the jurisdiction of the courts of the several states under the laws thereof. 7 F. C. A., Title 18, § 547; U. S. C. A., Title 18, § 547; id. U. S. C.

With reference to crimes, the original Constitution conferred on Congress only the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, United States Constitution, Art. 1, § 8, cl. 10; to provide for the punishment of counterfeiting the securities and current coin of the United States, United States Constitution, Art. 1, § 8, cl. 6; to declare the punishment of treason, United States Constitution, Art. 3, § 3, cl. 2; and vested in the Senate the power to try impeachments, United States Constitution, Art. 1, § 3, cl. 6. However, the enactment by Congress of penal statutes punishing many offenses other than those mentioned in the Constitution have been upheld under what has been called the "resulting powers of Congress" and as an aid to the execution of an express power or an aggregate of such powers. Common-law offenses against the United States are not recognized, but this limitation does not apply to the District of Columbia. Procedure in criminal cases after verdict or plea of guilty is governed by the Criminal Appeals Rules, promulgated by the Supreme Court under authority of the Act of February 24, 1933, as amended by Act approved March 8, 1934 (8 F. C. A., Title 28, § 723a; U. S. C. A., Title 28, § 723a; id. U. S. C.) and by Act approved June 29, 1940, ch. 445, the Supreme Court was authorized to prescribe rules to govern procedure in criminal cases prior to verdict or plea of guilty. The rules adopted under the authority of the last mentioned act appear at the end of this work immediately preceding the index.

725. Complaint.

United States of America,

_____ District of _____

The United States

v.

} Complaint for violation of
section _____ U. S. C.

Before me, the undersigned, a _____ for the _____ of _____, personally appeared this day _____, who, on oath, deposes and says that _____, on or about the _____ day of _____, 19____, at _____ in the _____ District of _____, did unlawfully, _____ contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe and does believe that _____, _____ are material witnesses to the subject-matter of this complaint.

Subscribed and sworn to before me this — day of —, 19—.

Statutory Reference.

Arrest and commitment, 7 F. C. A., Title 18, § 591; U. S. C. A., Title 18, § 591; id. U. S. C.

NOTES TO DECISIONS

Commitment.

A warrant of commitment by justice of the peace was illegal for want of stating good cause certain, supported by oath. *Ex parte Burford*, 3 Cranch (7 U. S.) 448, 2 L. ed. 495.

Designation in commitment of the crime of inveigling a person with intent to send him out of the state against his will is sufficient if the intent must necessarily be implied. *In re Kelly* (C. C. Ore.), 46 Fed. 653.

An affidavit of an officer of a United States vessel that he had captured a brig and found her to be a slaver, with negroes on board, shows probable cause for commitment for piracy. *In re Bates*, Fed. Cas. No. 1099a.

If the commitment is insufficient, the magistrate will recommit in proper form. *Ex parte Bennett*, Fed. Cas. No. 1311, 2 Cranch C. C. 612.

The committing magistrate must show a charge upon oath, and must attach his seal. *Ex parte Bennett*, Fed. Cas. No. 1311, 2 Cranch C. C. 612.

Commitment of a prisoner, with a view to a hearing by the commissioner should be for a time certain, and not to exceed 24 hours. *United States v. Worms*, Fed. Cas. No. 16765, 4 Blatchf. 332.

Commitment must show sufficient cause upon its face. *Ex parte Williams*, Fed. Cas. No. 17699, 4 Cranch C. C. 343.

A warrant issued by a commissioner is not void because he is designated, after his signature as "commissioner of the Circuit Court of the United States for the Western District of Arkansas," and designated otherwise in the body of the warrant. *Douglass v. Stahl*, 71 Ark. 236, 72 S. W. 568.

726. Warrant of Arrest.

The President of the United States of America to the marshal of the United States for — District of —, his deputies, or any or either of them:

Whereas, complaint on oath and in writing has been made before me, a United States commissioner for the — District of —, charging that AB did, on or about the — day of —, 19—, at —, in said district, unlawfully and wilfully, [describe acts set forth in the affidavit], contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States;

Now, therefore, you are hereby commanded to apprehend the said AB and bring his body forthwith before me, or any other commissioner having jurisdiction of the case, to answer the said complaint and to be dealt with according to law for the said offense.

Given under my hand and seal this — day of —, 19—.

[SEAL]

United States commissioner
for the — District of —.

Cross-References.

Bench warrant, Form 743.
Capias, Form 744.

Conspiracy, Form 740.
Warrant of removal, Form 742.
See notes to Form 725.

Statutory References.

Arrest and commitment, 7 F. C. A., Title 18, § 591 et seq.; U. S. C. A., Title 18, § 591 et seq.; id. U. S. C.

Arrest, operating illicit distillery, 7 F. C. A., Title 18, § 593; U. S. C. A., Title 18, § 593; id. U. S. C.

Arrest, violation Internal Revenue Laws, 7 F. C. A., Title 18, § 594; U. S. C. A., Title 18, § 594; id. U. S. C.

Writ as jailor's authority, 7 F. C. A.,

Title 18, § 603; U. S. C. A., Title 18, § 603; id. U. S. C.

Writ for removal of prisoner, 7 F. C. A., Title 18, § 604; U. S. C. A., Title 18, § 604; id. U. S. C.

Writs, several indictments against same persons, 7 F. C. A., Title 18, § 602; U. S. C. A., Title 18, § 602; id. U. S. C.

Writ to bring prisoner into court, 7 F. C. A., Title 18, § 605; U. S. C. A., Title 18, § 605; id. U. S. C.

727. Information.

— Court of the United States

— District of —

The United States

v.

Information

Violating section —.

Be it remembered, that — the attorney of the United States for the — District of — who prosecutes in behalf and with the authority of the United States, comes here in person into court at this — Term thereof, and for the United States gives the court to understand and be informed that one — did contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States attorney for the district aforesaid prays the consideration of this court here in the premises, and that due process of law may be awarded against the said — defendant—, in this behalf to make — answer to the United States touching and concerning the premises.

Dated at —, this — day of —, 19—.

United States attorney.

For the — District of —.

UNITED STATES OF AMERICA, }
— DISTRICT OF —, } ss:

I, —, United States attorney for the — District of —, being sworn, do say that the foregoing information is true as I verily believe.

Subscribed and sworn to before me this — day of —, 19—.

Cross-Reference.

See notes to Form 729.

Statutory References.

Capital or otherwise infamous crimes must be prosecuted by indictment of the grand jury, U. S. Const., Amend. 5.

Assessories before the fact declared

to be principals, 7 F. C. A., Title 18, § 550; U. S. C. A., Title 18, § 550; id. U. S. C.

Joinder of charges, 7 F. C. A., Title 18, § 557; U. S. C. A., Title 18, § 557; id. U. S. C.

Jurisdiction, 7 F. C. A., Title 18, §§ 451, 546, 574; U. S. C. A., Title 18, §§ 451,

546, 574; id. U. S. C.; 8 F. C. A., Title 28, § 41; U. S. C. A., Title 28, § 41; id. U. S. C.

Limitation of Actions, 7 F. C. A., Title 18, §§ 581 to 590; U. S. C. A., Title 18, §§ 581 to 590; id. U. S. C.

"Misdemeanors" and "felonies" defined, 7 F. C. A., Title 18, §§ 541, 555;

U. S. C. A., Title 18, §§ 541, 555; id. U. S. C.

Misdemeanors may be prosecuted by information or complaint, 7 F. C. A., Title 18, § 541; U. S. C. A., Title 18, § 541; id. U. S. C.

Venue, 7 F. C. A., Title 28, §§ 101 to 104, 114; U. S. C. A., Title 28, §§ 101 to 104, 114; id. U. S. C.

728. Information Accompanied by Plea of Guilty.

THE UNITED STATES OF AMERICA }
 — DISTRICT OF — } ss:
 — DIVISION. }

In the — Court of the United States, within and for the division and district aforesaid:

At the — Term of said court, in the year of our Lord one thousand nine hundred and —.

—, Attorney of the United States for the — District of —, who in this behalf prosecutes in the name of the United States, and for the United States, comes here into said court on this — day of —, in the year of our Lord one thousand nine hundred and —, in his own proper person, and for the United States gives the said court here to understand and be informed that — late of the division and district aforesaid, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and — at the county of —, in the division and district aforesaid, and within the jurisdiction of this court — contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Wherefore, said attorney, in behalf of the United States, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said — in this behalf, to make answer to the United States touching and concerning the premises aforesaid.

United States attorney.

For the — District of —.

— Court of the United States

— District of —

— Division

The United States

v.

No. —

And now comes said defendant — and waives process, enters appear-

ance, and for plea to said information, says that he is guilty, as he is therein and thereby charged.

Defendant.

Cross-Reference.

See notes to Forms 727, 729.

729. Indictment in One Count.

UNITED STATES OF AMERICA }
____ DISTRICT OF ____ } ss:

In the ____ Court of the United States, in and for the ____ District aforesaid, at the ____ Term thereof, 19—.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that ____ on the ____ day of ____, in the year of our Lord nineteen hundred ____, in the said district and within the jurisdiction of said court, did ____ contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

United States attorney.

Cross-References.

Conspiracy, Form 740.
See notes to Form 725.

Statutory References.

See annotations on criminal law and procedure in general following F. C. A., Title 18, § 575.

Assessories before the fact declared to be principals, 7 F. C. A., Title 18, § 550; U. S. C. A., Title 18, § 550; id. U. S. C.

Attacking indictment because of unqualified grand jurors, 7 F. C. A., Title 18, § 554a; U. S. C. A., Title 18, § 554a; id. U. S. C.

Capital or otherwise infamous crimes must be prosecuted by indictment of the grand jury, U. S. Const., Amend. 5.

Indictment not insufficient for defect in form unless defendant actually prejudiced, nor by reason of attendance of clerical assistants before the grand jury,

7 F. C. A., Title 18, § 556; U. S. C. A., Title 18, § 556; id. U. S. C.

Joinder charges, 7 F. C. A., Title 18, § 557; U. S. C. A., Title 18, § 557; id. U. S. C.

Jurisdiction, subject-matter, 7 F. C. A., Title 18, §§ 451, 546, 574; U. S. C. A., Title 18, §§ 451, 546, 574; id. U. S. C.; 7 F. C. A., Title 28, § 41; U. S. C. A., Title 28, § 41; id. U. S. C.

Limitations of actions, 7 F. C. A., Title 18, §§ 581 to 590; U. S. C. A., Title 18, §§ 581 to 590; id. U. S. C.

"Misdemeanors" and "felonies" defined, 7 F. C. A., Title 18, §§ 541, 555; U. S. C. A., Title 18, §§ 541, 555; id. U. S. C.

Misdemeanors may be prosecuted by information or complaint, 7 F. C. A., Title 18, § 541; U. S. C. A., Title 18, § 541; id. U. S. C.

Venue, 7 F. C. A., Title 28, §§ 101 to 104, 114; U. S. C. A., Title 28, §§ 101 to 104, 114; id. U. S. C.

NOTES TO DECISIONS

Adopting State Laws.

Under charge of cutting and stabbing with intent to kill committed in a place wherein the United States had exclusive jurisdiction, but such crime being one

not provided for by the federal statutes, the indictment is sufficient if it complies with the state laws applicable thereto. *United States v. Tucker* (D. C.-Ky.), 122 Fed. 518.

Indictment sufficient for grand larceny alleged to have been committed upon the fort and military post and reservation known as West Point, in the county of Orange, in the southern district of New York. *United States v. Franklin* (C. C.-N. Y.), 174 Fed. 163.

It was unnecessary to aver in the indictment that the crime was not punishable by any law of Congress, and was punishable by the state laws. *United States v. Wright*, Fed. Cas. No. 16774, 15 Int. Rev. Rec. 9.

Adultery.

In an indictment against a married man under 7 F. C. A., Title 18, § 516; U. S. C. A., Title 18, § 516; id. U. S. C., it is not necessary to allege that the woman with whom the offense is charged to have been committed was either a married or an unmarried woman. *United States v. Meyers*, 14 N. Mex. 522, 99 Pac. 336.

Where the alleged act was committed by a man with a married woman, a conviction will be sustained though the indictment aver that the accused was a married man and the proof shows him to have been unmarried. *United States v. Cook*, 15 N. Mex. 124, 103 Pac. 305.

Arson.

Indictment failing to charge that the building burned was the dwelling place of any person was insufficient to charge an Indian with arson in the burning of a "building" upon an Indian reservation. *United States v. Cardish* (D. C.-Wis.), 143 Fed. 642, 640.

An indictment sufficiently described a dwelling-house by alleging: "A certain dwelling house of the United States of America there situate, such dwelling house being then and there known as the 'Girls' Building of the Menominee Indian Training School,' and then and there occupied and used as such dwelling house of the United States of America by teachers of the said United States in the Indian service, and by other persons, such teachers and other persons being to the grand jury unknown." *United States v. Cardish* (D. C.-Wis.), 145 Fed. 242. See also 143 Fed. 642.

Assault with Dangerous Weapon.

An assault with intent to kill is not the same as an assault with intent to commit murder and the statutes of the

United States do not name any such offense as assault with intent to commit murder. *United States v. Barnaby* (C. C.-Mont.), 51 Fed. 20.

An indictment charging an assault with a knife with intent to kill is not sufficient to charge an assault with intent to murder. *United States v. Barnaby* (C. C.-Mont.), 51 Fed. 20.

7 F. C. A., Title 18, § 455; U. S. C. A., Title 18, § 455; id. U. S. C. is the only federal statute providing for the punishment of common assault, and its applicability is expressly limited to assaults committed in places within either the exclusive or the admiralty jurisdiction of the United States. *Bray v. United States* (C. C. A. 4), 289 Fed. 329.

Indictment for assault with dangerous weapon, alleging that the offense was committed on board an American ship in the harbor of Guantanamo in the Island of Cuba, was bad for failure to allege that the place of committing the offense was out of the jurisdiction of any of the states of the Union. *United States v. Anderson* (C. C.-N. Y.), Fed. Cas. No. 14448, 17 Blatchf. 238.

7 F. C. A., Title 18, § 455; U. S. C. A., Title 18, § 455; id. U. S. C. punishing assault with a dangerous weapon, contemplates a misdemeanor, hence the indictment need not allege that the assault was committed "feloniously," or with intent to perpetrate a felony. *United States v. Gallagher* (C. C.-N. Y.), Fed. Cas. No. 15185, 2 Paine 447.

Indictment under 7 F. C. A., Title 18, § 455; U. S. C. A., Title 18, § 455; id. U. S. C. for assault with a dangerous weapon, alleging the names of certain persons as owners of the ship, allegation of name of owner to be "William Nye" and evidence showed name to be "Willard Nye," did not render indictment bad for variance. *United States v. Howard* (C. C.-Mass.), Fed. Cas. No. 15403, 3 Sumn. 12.

False Claims against Government.

A false affidavit may consist of a genuine affidavit of false statements. *United States v. Staats*, 8 How. (49 U. S.) 41, 12 L. ed. 979.

The particular deceitful practices by which the fraud is alleged to have been committed should be to such an extent set forth in the indictment as to make the fraud appear on its face. *United States v. Goggin* (C. C.-Wis.), 1 Fed. 49,

An indictment charging the presentation of a claim to the "first auditor of the treasury" was sufficient without naming such first auditor. *United States v. Ambrose* (C. C.-Ohio), 2 Fed. 764.

Offenses under R. S., § 4746 (7 F. C. A., Title 18, § 81; U. S. C. A., Title 18, § 81; id. U. S. C.) can be prosecuted only by indictment. *United States v. Tod* (C. C.-Ohio), 25 Fed. 815.

An indictment under R. S., § 5438 (7 F. C. A., Title 18, § 80; U. S. C. A., Title 18, § 80; id. U. S. C.) for making a false deposition need not allege the use or attempted use of the deposition, nor that a claim had been filed or was pending when the deposition was made. *United States v. Rhodes* (C. C.-Mo.), 30 Fed. 431.

A conspiracy to defraud must be followed by some object to effect that purpose. *United States v. Reichert* (C. C.-Cal.), 32 Fed. 142.

Motion to quash indictment for aiding and procuring a named person to make a false affidavit in support of a pension claim on ground that the affidavit was in fact taken before a proper officer was refused. *United States v. Gowdy* (D. C.-S. Car.), 37 Fed. 332.

In prosecution for making a false claim, under R. S., § 5438 (7 F. C. A., Title 18, § 80; U. S. C. A., Title 18, § 80; id. U. S. C.), the indictment must allege the name of the officer to whom the claim was presented. *United States v. Wallace* (D. C.-S. Car.), 40 Fed. 144.

An indictment alleging the making of a certain false, fictitious, and fraudulent account and stating the particular items of the account and that they were false and that the account was made for purpose of obtaining payment on a false, fictitious, and fraudulent claim was sufficient. *United States v. Wallace* (D. C.-S. Car.), 40 Fed. 144. See also *Hammert v. United States* (C. C. A. 8), 14 Fed. (2d) 827.

The officer to whom a false claim is presented is sufficiently identified in the indictment by the reference to him as "the third auditor of the treasury department of the United States." *United States v. Ingraham* (C. C.-R. I.), 49 Fed. 155. *Affid. 155 U. S. 434*, 39 L. ed. 213, 15 Sup. Ct. 148.

Indictment is sufficient if it allege the presentation of an affidavit with a signature known to be false and forged, it need not allege that the pension claim

was false. *United States v. Adler* (D. C.-Iowa), 49 Fed. 733.

R. S., § 4746 (7 F. C. A., Title 18, § 81; U. S. C. A., Title 18, § 81; id. U. S. C.) does not require that the pension claim be false, where a forged affidavit is presented. *United States v. Adler* (D. C.-Iowa), 49 Fed. 733.

Under the conspiracy clause of R. S., § 5438 (7 F. C. A., Title 18, § 80; U. S. C. A., Title 18, § 80; id. U. S. C.), the particulars of the fraudulent claim must be alleged. *United States v. Greene* (D. C.-Ga.), 115 Fed. 343.

Under R. S., § 4746, as amended by Act of July 7, 1898, ch. 578 (7 F. C. A., Title 18, § 81; U. S. C. A., Title 18, § 81; id. U. S. C.), an indictment for procuring the presentation of a false writing to the pension department in support of a claim is bad for not stating how it was presented, nor who was procured to present it, unless it be alleged that the name of such person is unknown. *Miller v. United States* (C. C. A. 7), 136 Fed. 581.

Indictment for making and presenting a false claim against the United States to the superintendent of the Military Academy at West Point, an officer having authority to approve the claim, which was for supplies furnished, was sufficient in form and substance. *United States v. Franklin* (C. C.-N. Y.), 174 Fed. 161.

Indictment for presenting false claim to United States military officer for approval and payment must aver the authority of the officer to act on the claim. *United States v. Christopherson* (D. C.-Mo.), 261 Fed. 225.

Indictment for unlawful purchase of oats from soldiers in quartermaster's department was sufficient. *Eisenberg v. United States* (C. C. A. 5), 261 Fed. 598.

Where special agent of General Land Office presented claim against government for expenses, and some items were false and fraudulent, each separate false and fraudulent item constituted the basis for separate count in the indictment. *Fain v. United States* (C. C. A. 9), 265 Fed. 473.

Where an offense of conspiracy to defraud is charged as of dates both before and after the passage of the act under which the indictment was drawn the indictment is insufficient. *United States v. Dobson* (D. C.-Pa.), 277 Fed. 126.

An indictment under 7 F. C. A., Title 18, § 80; U. S. C. A., Title 18, § 80; id. U. S. C., in which, in addition to the embodiment of the words of the statute, the identical transaction is further particularized by the date, amount, and nature of the transaction, together with the place and names of the parties concerned, is sufficient. *Summers v. United States* (C. C. A. 4), 11 Fed. (2d) 583. Cert. den. 271 U. S. 681, 70 L. ed. 1149, 46 Sup. Ct. 632.

Indictment charging defendants with presenting to the camp director of a Civilian Conservation Corps a fraudulent claim should allege presentment upon or against the government of the United States, or any department or officer thereof, or any corporation in which the United States was a stockholder. *Mookini v. United States* (C. C. A. 9), 95 Fed. (2d) 960.

Where essential element of crime under statute is that the claim be presented "for payment or approval," such purpose must be alleged. *United States v. Morrison* (D. C.-N. Y.), 16 Fed. Supp. 934.

An indictment in the words of 7 F. C. A., Title 18, § 80; U. S. C. A., Title 18, § 80; id. U. S. C. for prosecuting a false claim is not sufficient. *United States v. Green* (C. C.-Wis.), Fed. Cas. No. 15257.

Indictment must allege presentment of a false claim with intent to defraud the United States. *United States v. Stubbs*, 6 Alaska 736.

Indictment charging defendant with presenting to second auditor of treasury a false claim for back pay of a deceased soldier, to which he claimed to be next of kin, was sufficient under 7 F. C. A., Title 18, § 80; U. S. C. A., Title 18, § 80; id. U. S. C. *United States v. Bowen*, 3 MacArthur (10 D. C.), 64.

The rule that an indictment is sufficient if the offense charged in the words of the statute is limited to cases where the words of the statute themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense. *United States v. Medina*, 15 N. Mex. 204, 103 Pac. 976.

Forging Claims against Government.

An indictment for murder charging that the defendants acted jointly and not showing which one of the defendants committed the assault was good, the

offense being one which in its nature might be committed by one or more. *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. 1002.

An indictment which, in one count, charges defendant with making or causing to be made a certain false writing and with transmitting or causing it to be transmitted to an officer of the United States, charges several offenses, is good as against motion in arrest. *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. 952.

Allegations that death ensued from shooting and drowning were not repugnant. *Andersen v. United States*, 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. 689.

It is not necessary to charge that the assault was felonious if the acts constituting the assault are alleged to have been made feloniously and with malice aforethought. *Holt v. United States*, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. 2, affg. (C. C.-Wash.), 168 Fed. 141.

Where the charge in the indictment is murder, it includes the minor offense of manslaughter. *United States v. Leonard* (C. C.-N. Y.), 2 Fed. 669.

Under R. S., § 5421 (7 F. C. A., Title 18, § 73; U. S. C. A., Title 18, § 73; id. U. S. C.), the indictment must describe the writing with certainty as to its forgery or falsity. *United States v. Albert* (C. C.-Fla.), 45 Fed. 552.

The rule which requires an indictment to set out the entire instrument or its tenor seems limited mainly, if not wholly, to cases of forgery, counterfeiting money, and threatening letters. *United States v. French* (C. C.-Mass.), 57 Fed. 382; *United States v. Heinze* (C. C.-N. Y.), 161 Fed. 425.

The writing must be altered, forged, or counterfeit, and the mere falsity thereof is not sufficient to sustain an indictment. *United States v. Moore* (D. C.-N. Y.), 60 Fed. 738.

An indictment under R. S., § 5421 (7 F. C. A., Title 18, § 73; U. S. C. A., Title 18, § 73; id. U. S. C.), for transmitting and for uttering a falsely altered certificate of surgeons in connection with a pension claim must show that there is an account or claim against the United States and that in support thereof the defendant knowingly transmitted or procured to be transmitted the altered certificate. *United States v. Kessel* (D. C.-Iowa), 62 Fed. 59.

Indictment for presenting altered affidavit on pension claim was defective under 7 F. C. A., Title 18, § 73; U. S. C. A., Title 18, § 73; id. U. S. C., for failure to aver the intent or purpose of defrauding the United States. *United States v. Van Leuven* (D. C.-Iowa), 62 Fed. 69.

Indictment charging postmaster with forging name of a justice of the peace to the affidavit supporting his report to the government was insufficient under 7 F. C. A., Title 18, § 73; U. S. C. A., Title 18, § 73; id. U. S. C. for stating intent to defraud United States instead of to obtain money from the United States. *Staton v. United States* (C. C. A. 8), 88 Fed. 253.

Indictment charging forgery of United States draft, but showing forgery to consist of falsely making and forging the name of the payee was bad as repugnant, in that it alleged forgery of the draft instead of the indorsement. *De Lemos v. United States* (C. C. A. 5), 91 Fed. 497.

Indictment charging a named army officer with forging a certificate of deposit purporting to be issued by the United States to a soldier with the intent to defraud both the soldier and the United States was not subject to the objection that it charged two offenses each having different intent. *Neall v. United States* (C. C. A. 9), 118 Fed. 699.

It is sufficient to set out writings, averring generally the intent to defraud the United States, and omitting all extrinsic circumstances. *Meldrum v. United States* (C. C. A. 9), 151 Fed. 177, 10 Ann. Cas. 324, affg. 146 Fed. 390.

An indictment charging forgery of indorsement on a government check is bad where it charges intent to defraud the payee and does not show intent to obtain money from or defraud the United States. *Lewis v. United States* (C. C. A. 8), 8 Fed. (2d) 849.

Indictment for forging indorsement on liberty bonds was sufficient though the necessary steps to complete the transfer were not taken. *Meadows v. United States* (C. C. A. 9), 11 Fed. (2d) 718; *Mosheik v. United States* (C. C. A. 5), 63 Fed. (2d) 533. Cert. den. 290 U. S. 654, 78 L. ed. 567, 54 Sup. Ct. 70.

Indictment against one aiding and abetting a murder was sufficient, especially where no objection was made in

the court below. *Hale v. United States* (C. C. A. 8), 25 Fed. (2d) 430.

Indictment alleging forgery of compensation check issued by Veterans' Bureau with intent to defraud a trust company, did not state an offense. *White v. Levine* (C. C. A. 10), 40 Fed. (2d) 502.

Indictment charging forgery of indorsement on liberty bonds with intent to defraud the owner of such bonds, an individual, did not charge an offense against the United States. *Martin v. White* (C. C. A. 10), 47 Fed. (2d) 835.

Indictment against attorney for forgery of check payable to client and drawn upon the treasurer of the United States, stated an offense. *United States v. Sloat* (D. C.-N. J.), 56 Fed. (2d) 434.

Indictment for possessing and fraudulently indorsing and uttering check issued by Veterans' Bureau charged an offense under 7 F. C. A., Title 18, § 73; U. S. C. A., Title 18, § 73; id. U. S. C. and not under § 265. *Webster v. United States* (C. C. A. 8), 59 Fed. (2d) 583. Cert. den. 287 U. S. 629, 77 L. ed. 545, 53 Sup. Ct. 81.

It is immaterial that the acts complained of could not have defrauded the United States in a pecuniary way, it being sufficient that the administrative functions of the government were impaired. *United States v. Goldsmith* (C. C. A. 2), 68 Fed. (2d) 5. Cert. den. 291 U. S. 681, 78 L. ed. 1068, 54 Sup. Ct. 559.

An indictment alleging that defendant forged a purported check on the treasurer of the United States with intent to defraud the government, and knowingly and feloniously uttered the same as genuine, setting out the check and indorsement was sufficient under 7 F. C. A., Title 18, § 73; U. S. C. A., Title 18, § 73; id. U. S. C. *Buckner v. Aderhold* (C. C. A. 5), 73 Fed. (2d) 255.

Indictment charging forgeries on employment cards and the uttering such a card causing the diversion of funds allocated by the Public Works Administration, though disbursed by state agencies, stated an offense within 7 F. C. A., Title 18, § 72; U. S. C. A., Title 18, § 72; id. U. S. C. *Madden v. United States* (C. C. A. 1), 80 Fed. (2d) 672. Cert. den. 297 U. S. 710, 80 L. ed. 997, 56 Sup. Ct. 502.

It is essential to the crime of murder that the killing should be from what the law denominates malice aforethought, and the prosecution must prove the al-

legation of malice. *United States v. McGlue* (C. C.-Mass.), Fed. Cas. No. 15679, 1 Curt 1.

Indictment joining counts for conspiracy with count for murder, in the killing of an officer attempting to serve process, was defective for misjoinder. *United States v. Scott* (D. C.-Ind.), Fed. Cas. No. 16241, 4 Biss. 29.

Impersonating United States Officer.

Indictment charging the requisite fraudulent intent, the date and place of the commission of the act charged, and giving the name and official character of the officer whom the accused was charged with having falsely impersonated, was sufficient. *Lamar v. United States*, 241 U. S. 103, 60 L. ed. 912, 36 Sup. Ct. 535.

Indictment charging both crimes described in 7 F. C. A., Title 18, § 76; U. S. C. A., Title 18, § 76; *id.* U. S. C. is bad for duplicity. *United States v. Taylor* (D. C.-Mo.), 108 Fed. 621.

Indictment charging that the accused did assume and pretend to be an officer was good without using the word "falsely." *King v. United States* (C. C. A. 5), 279 Fed. 103; *Ferguson v. United States* (C. C. A. 8), 293 Fed. 361.

Indictment alleging that defendant pretended "to be acting under the authority of the United States," was not equivalent to the statutory words "and shall take upon himself to act as such." *Baas v. United States* (C. C. A. 5), 25 Fed. (2d) 294.

Indictment was sufficient to sustain conviction for impersonating immigration officer. *Heskett v. United States* (C. C. A. 9), 58 Fed. (2d) 897. Cert. den. 287 U. S. 643, 77 L. ed. 556, 53 Sup. Ct. 89.

Jurisdiction, Subject-Matter.

Courts of the United States are without jurisdiction to try master of ship for manslaughter in killing of a seaman on board an American ship in the river Tigris, in China. *United States v. Wiltberger*, 5 Wheat. (18 U. S.) 76, 5 L. ed. 37.

A vessel in an open road may be found by the jury to be on the seas, and it is immaterial that it may be at anchor. "Such vessels are neither in a river, haven, basin, or bay, and are nowhere, unless it be on the seas." *United States v. Pirates*, 5 Wheat. (18 U. S.) 184, 5 L. ed. 64.

Crime committed against the laws of the United States out of the limits of a state are not local but may be tried at such place as Congress may designate, but are local if committed within a state. They must then be tried in the district in which the offense was committed. *United States v. Jackalow*, 1 Black (66 U. S.) 484, 17 L. ed. 225. See *United States v. Plumer* (C. C.-Mass.), Fed. Cas. No. 16056, 3 Cliff 28.

For crime committed upon high seas, jurisdiction to try the accused may be exercised by court of district in which accused is first apprehended. *United States v. Arwo*, 19 Wall. (86 U. S.) 486, 22 L. ed. 67. See also *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. 80; *United States v. Bowman*, 260 U. S. 94, 67 L. ed. 149, 43 Sup. Ct. 39.

Exclusive jurisdiction of the courts of the United States is not affected by the fact that the offense may have been actually committed on a part of the military reservation not at the time being used as such. *Benson v. United States*, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. 60.

The term "high seas" is applicable to the open, unclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. *United States v. Rodgers*, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. 109.

Where there is nothing on the face of the indictment to show affirmatively that the court did not have jurisdiction, the sentence can not be held void on a collateral attack. *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. 746.

The locality of the offense was sufficiently shown by the averment that it was committed on board of an American vessel, on the high seas, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular state of the Union. *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. 1002; *Andersen v. United States*, 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. 689.

Crime committed within the limits of an Indian Reservation by one other than an Indian, or against Indians, is punishable in the courts of the state. *Draper v. United States*, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. 107.

A crime committed by one Indian against another upon land within a res-

ervation which has been allotted and patented on conditional alienation is within the exclusive jurisdiction of the federal court. *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. 93.

White person killing an Indian upon a reservation within the limits of a state may be tried and punished in the federal courts. *Donnelly v. United States*, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. 449, Ann. Cas. 1913E, 710; *United States v. Berry* (D. C.-Colo.), 4 Fed. 779.

The territorial jurisdiction of the United States does not depend upon the size of the particular areas which are held for federal purposes. The murder of an Indian upon an allotment awarded him, as which the government holds title in trust for the Indian, may be punished in the federal courts. *United States v. Pelican*, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. 396.

Indictment charging situs of crime on specifically described parcel of land, under exclusive jurisdiction of United States by cession from state, was good without describing character of use of land by United States. *Brown v. United States*, 256 U. S. 335, 65 L. ed. 961, 41 Sup. Ct. 501, 18 A. L. R. 1276, revg. on other grounds (C. C. A. 5), 257 Fed. 46.

Federal court had exclusive jurisdiction where crime was committed on military post, ground for which was purchased from, or ceded by, a state. *Kelly v. United States* (C. C.-Maine), 27 Fed. 616; *Ex parte Hebard* (C. C.-Mass.), Fed. Cas. No. 6312, 4 Dill. 380; *United States v. Cornell* (C. C.-R. I.), Fed. Cas. No. 14867, 2 Mason 60, Fed. Cas. No. 14868, 2 Mason 91; *State v. Seymour*, 78 Miss. 134, 28 So. 799; *State v. Morris*, 76 N. J. L. 222, 68 Atl. 1103; *Baker v. State*, 47 Tex. Cr. 482, 83 S. W. 1122, 122 Am. St. 703, 11 Ann. Cas. 751.

Where a person is being prosecuted for murder alleged to have been committed in a building owned by the federal government upon lands ceded to it by the state, it is not necessary that the indictment should allege the title to be in the United States. *United States v. Battle* (C. C.-Ga.), 154 Fed. 540. Affd. 209 U. S. 36, 52 L. ed. 670, 23 Sup. Ct. 422.

An indictment charging an offense committed on land described by metes and bounds, acquired by the United States for "public purposes" and under

its exclusive jurisdiction, was sufficiently specific to give federal court jurisdiction. *Brown v. United States* (C. C. A. 5), 257 Fed. 46.

The place being sufficiently described, the court will take judicial notice of its federal character. *Brown v. United States* (C. C. A. 5), 257 Fed. 46.

A vessel moored to a wharf in a foreign port is not upon the high seas. *United States ex rel. Maro v. Mathues* (D. C.-Pa.), 21 Fed. (2d) 533. Affd. 27 Fed. (2d) 518.

Offense is within federal jurisdiction as on high seas, when committed within three miles of coast. *Murray v. Hildreth* (C. C. A. 5), 61 Fed. (2d) 483.

Crime committed upon a vessel lying at a port in a state of the Union is not committed on the high seas, and the federal court was without jurisdiction. *United States v. Davis* (C. C.-N. Y.), Fed. Cas. No. 14931.

Courts of United States were without jurisdiction where the offense was committed on board a foreign vessel on the high seas. *United States v. Davis* (C. C.-Mass.), Fed. Cas. No. 14932, 2 Sumn. 482; *United States v. Jackson* (C. C.-N. Y.), Fed. Cas. No. 15457, 2 N. Y. Leg. Obs. 3; *United States v. Morel* (C. C.-Pa.), Fed. Cas. No. 15807, Brun. Col. Cas. 373.

The waters of a bay which is entirely land-locked and enclosed by reefs are not the "high seas." *United States v. Robinson* (C. C.-R. I.), Fed. Cas. No. 16176, 4 Mason 307.

A charge that a crime was committed upon the high seas was sustained by proof that it was committed upon a vessel while she was lying in a river. *United States v. Smith* (C. C.-Pa.), Fed. Cas. No. 16344, 3 Wash. C. C. 78.

For a crime committed in a building rented and used as a post-office by the United States, the state courts have jurisdiction. *Brooke v. State*, 155 Ala. 78, 46 So. 491.

Larceny.

Punishment is not dependent on value of property stolen, therefore, it is not necessary that an indictment under 7 F. C. A., Title 18, § 466; U. S. C. A., Title 18, § 466; id. U. S. C., allege the value of the property. *Brown v. United States* (C. C. A. 8), 146 Fed. 975.

An indictment for larceny must use the words of the statute, or at least its

substance, for it is punishable as a statutory crime, and it would not be sufficient to allege guilt of theft or larceny. *United States v. Davis* (C. C. Mass.), Fed. Cas. No. 14930, 5 Mason 356.

It is not indispensable to the conviction of persons accused of theft that the owner of the property should be known, and the indictment may allege, and the proof may show, that the owner was unknown. *United States v. Davis* (C. C. N. Y.), Fed. Cas. No. 14931, 2 N. Y. Leg. Obs. 35; *United States v. Stetson* (C. C. Mass.), Fed. Cas. No. 16390, 3 Woodb. & M. 164.

An indictment is insufficient if it alleges the ownership of the goods as in one who was dead at the time they were taken, since a dead man could not have goods and chattels. *United States v. Mason* (C. C.-D. C.), Fed. Cas. No. 15738, 2 Cranch C. C. 410.

Larceny, Goods in Interstate Commerce.

A joint indictment must be regarded as a several charge against each defendant. *United States v. Le Fanti* (D. C.-N. J.), 255 Fed. 210. Affd. (C. C. A. 3), 259 Fed. 460; *Grandi v. United States* (C. C. A. 6), 262 Fed. 123.

Allegation that property was stolen implies that it was taken without consent of owner. *Bloch v. United States* (C. C. A. 5), 261 Fed. 321. Cert. den. 253 U. S. 484, 64 L. ed. 1025, 40 Sup. Ct. 481; *Fleck v. United States* (C. C. A. 8), 265 Fed. 617.

Where indictment alleges that goods were in freight yard of certain railroad and that they were part of an interstate shipment of freight and objection that the bailee of the goods was not sufficiently described comes too late after trial and verdict. *Nudelman v. United States* (C. C. A. 9), 264 Fed. 942.

Allegation that shipment was in possession of the President of the United States by and through the Director General of Railroads sufficiently showed ownership. *Pounds v. United States* (C. C. A. 7), 265 Fed. 242; *Fleck v. United States* (C. C. A. 8), 265 Fed. 617.

Failure to specify quantity of load was not such a defect as to render the indictment void. *Rosenblatt v. United States* (C. C. A. 2), 271 Fed. 435. Cert. den. 256 U. S. 695. 65 L. ed. 1176, 41 Sup. Ct. 436.

Indictment naming consignee of the stolen property is good without further allegation of ownership. *Carr v. Northern Pac. R. Co.* (C. C. A. 9), 273 Fed. 511; *Falgout v. United States* (C. C. A. 5), 279 Fed. 513, 29 A. L. R. 1115.

Counts of an indictment under 7 F. C. A., Title 18, § 409; U. S. C. A., Title 18, § 409; id. U. S. C. are sufficient if they describe the goods, specifically allege that they were in interstate transit, give the name of the consignee and the locality of the offense, and show that they were abstracted or unlawfully possessed by the defendant. *White v. United States* (C. C. A. 2), 273 Fed. 517.

Indictment charging "unlawful and felonious possession" with knowledge is sufficient without alleging intent to convert. *Applebaum v. United States* (C. C. A. 7), 274 Fed. 43. Cert. den. 256 U. S. 704, 65 L. ed. 1180, 41 Sup. Ct. 625.

To sustain conviction for having in possession, it must be alleged and proved that the goods were stolen from some one of the particular places named in the statute. *United States v. Cohen* (C. C. A. 3), 274 Fed. 596; *Wolkoff v. United States* (C. C. A. 6), 84 Fed. (2d) 17.

Indictment under 7 F. C. A., Title 18, § 409; U. S. C. A., Title 18, § 409; id. U. S. C. may follow language of statute. *Hall v. United States* (C. C. A. 8), 277 Fed. 19.

It is not necessary that the indictment show the manner of taking and carrying away of the property in question. *Hall v. United States* (C. C. A. 8), 277 Fed. 19.

Indictment charging that defendant did "break into, steal, take, and carry away certain goods" was not bad. *United States v. Barber* (D. C.-Fla.), 289 Fed. 523.

Indictment need not allege the general or special ownership of the car entered. *Zimmerman v. United States* (C. C. A. 8), 290 Fed. 376.

Indictment charging all four of the offenses denounced by 7 F. C. A., Title 18, § 409; U. S. C. A., Title 18, § 409; id. U. S. C., and adding to them another offense of aiding, assisting and abetting in each of the four, is multifarious. *United States v. Hopkins* (D. C.-Fla.), 290 Fed. 619.

Vagueness in description of property in indictment does not render it insufficient where accompanied by an averment that a further description is to the

grand jury unknown. *United States v. Hopkins* (D. C.-Fla.), 290 Fed. 619.

Indictment must set forth the means by which fraud was practiced in obtaining possession of the goods. *United States v. Hopkins* (D. C.-Fla.), 290 Fed. 619.

Maritime Revolt.

The offense consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. *United States v. Kelly*, 11 Wheat. (24 U. S.) 417, 6 L. ed. 508.

An indictment under this section may be in the words of the statute. *Rees v. United States* (C. C. A. 4), 95 Fed. (2d) 784, 1938 A. M. C. 531; *United States v. Seagrist* (C. C.-N. Y.), Fed. Cas. No. 16245, 4 Blatchf. 420.

The unlawful acts which fall within the definition of a maritime revolt are distributed by 7 F. C. A., Title 18, § 484; U. S. C. A., Title 18, § 484; *id.* U. S. C. into four categories or classes: (1) Simple resistance to the exercise of the captain's authority; (2) the deposition of the captain from his command; (3) the transfer of the captain's power to a third person; (4) the usurpation of the captain's power by the person accused. *United States v. Almeida* (D. C.-Pa.), Fed. Cas. No. 14433, 2 Whart. Prec. Ind. § 1061 note; *United States v. Borden* (D. C.-Mass.), Fed. Cas. No. 14625, 1 Spr. 374.

An indictment attempted to be drawn under this section which merely charges that at the time and place named the defendants, "with force and arms did then and there feloniously make a revolt on board" the named ship, was insufficient to sustain a conviction because not being specific as to the commission of the offense. *United States v. Almeida* (D. C.-Pa.), Fed. Cas. No. 14433, 2 Whart. Prec. Ind. § 1061 note.

To bring a case within 7 F. C. A., Title 18, § 483; U. S. C. A., Title 18, § 483; *id.* U. S. C., the voyage for which the seamen are shipped must be a lawful one, and they must at the time be of the crew of an American ship or vessel.

United States v. Jenkins (C. C.-N. Y.), Fed. Cas. No. 15473a; *United States v. Rogers* (C. C.-R. I.), Fed. Cas. No. 16189, 3 Sumn. 342.

The offense may be proved to have been committed in a foreign port though the indictment allege that it was committed on the high seas. *United States v. Keefe* (C. C.-Mass.), Fed. Cas. No. 15509, 3 Mason 475.

Assault and battery committed by a seaman upon his commander does not amount to an endeavor to make a revolt. *United States v. Lawrence* (C. C.-D. C.), Fed. Cas. No. 15575, 1 Cranch C. C. 94.

Motor Vehicles, Transportation of Stolen Vehicles.

Allegation that defendant "knowingly, unlawfully, and feloniously did transport and cause to be transported" a certain automobile that had been stolen and that the defendant did not have the consent of the owner to transport it "all of which he * * * then and there well knew" sufficiently charged knowledge on part of defendant that automobile was stolen. *Brooks v. United States*, 267 U. S. 432, 67 L. ed. 699, 45 Sup. Ct. 345, 37 A. L. R. 1407.

The name of the carrier, the method of transportation, and the name of the owner of the vehicle, need not be alleged in the indictment. *Foster v. United States* (C. C. A. 9), 4 Fed. (2d) 107.

Indictment need not allege ownership or value. *Whitaker v. United States* (C. C. A. 9), 5 Fed. (2d) 546. Cert. den. 269 U. S. 569, 70 L. ed. 416, 46 Sup. Ct. 25.

Unlawful storing and sale could be joined in indictment. *Edwards v. United States* (C. C. A. 8), 7 Fed. (2d) 598.

The particulars of the theft and especially the time when it occurred need not be alleged in the indictment. *Abraham v. United States* (C. C. A. 8), 15 Fed. (2d) 911.

Indictment containing no direct and positive allegation that vehicle received had been stolen is insufficient. *Jones v. United States* (C. C. A. 8), 19 Fed. (2d) 316.

Indictment charging that automobiles had been stolen and transported in interstate commerce need not allege knowledge or consent of the owner to such transportation or the particular time that the automobiles were stolen. *Heglin v. United States* (C. C. A. 8), 27 Fed. (2d) 310.

Indictment was sufficient though not containing a direct averment that the automobile was in fact stolen prior to reception of the same by defendant. *Wendell v. United States* (C. C. A. 4), 34 Fed. (2d) 92.

In prosecution under 7 F. C. A., Title 18, § 408; U. S. C. A., Title 18, § 408; id. U. S. C., an indictment charging accused under a number of aliases was not prejudicial where their use was proved. *United States v. Solowitz* (C. C. A. 7), 99 Fed. (2d) 714.

Neutrality, Offenses Against.

An indictment attempting to charge a conspiracy to commit an offense against the United States denounced by 7 F. C. A., Title 18, § 25; U. S. C. A., Title 18, § 25; id. U. S. C. was bad for failure to show that the aims of the conspiracy constituted a military enterprise denounced by the statute. *United States v. Bopp* (D. C.-Cal.), 230 Fed. 723.

An indictment for conspiracy to commit the offense denounced by 7 F. C. A., Title 18, § 25; U. S. C. A., Title 18, § 25; id. U. S. C. was good as against demurrer, which showed a preconcerted plan, the persons charged and the "said other parties" acting together for the common purpose of attacking and destroying a military institution of a belligerent nation, all directed by a common leadership. *United States v. Tauscher* (D. C.-N. Y.), 233 Fed. 597.

It is sufficient to charge that the defendants by an act the character of which is war-like, inaugurated and set on foot an enterprise for the furtherance of a military or war-like purpose against a kingdom or country with which the United States is at peace. *United States v. Chakraberty* (D. C.-N. Y.), 244 Fed. 287.

Some definite act or acts of which the mind can take cognizance must be proved to sustain a charge against a defendant under this section of the statute. *United States v. Smith* (C. C.-N. Y.), Fed. Cas. No. 16342a.

Piracy.

An indictment for piracy need not aver that the defendant was a citizen of the United States. *United States v. Pirates*, 5 Wheat. (18 U. S.) 184, 5 L. ed. 64.

As respects intent, this is the same in piracy as in all other crimes where the intent is material. All that is requisite to be shown is that the act is felonious. *Ambrose Light* (D. C.-N. Y.), 25 Fed. 408; *Davison v. Seal-Skins* (C. C.-N. Y.), Fed. Cas. No. 3661, 2 Paine 324; *United States v. Tully* (C. C.-Mass.), Fed. Cas. No. 16545, 1 Gall. 247.

Motion to dismiss indictment upon ground court should judicially notice vessel allegedly robbed was within territory of State of California at time of crime, was granted as to count under 7 F. C. A., Title 18, § 481; U. S. C. A., Title 18, § 481; id. U. S. C. *United States v. Carrillo* (D. C.-Cal.), 13 Fed. Supp. 121, 1936 A. M. C. 128.

Indictment need not allege nationality of the vessel, but it is sufficient to allege that the vessel belonged to a citizen of the United States. *United States v. Demarchi* (C. C.-N. Y.), Fed. Cas. No. 14944, 5 Blatchf. 84.

Polygamy or Unlawful Cohabitation.

7 F. C. A., Title 18, § 514; U. S. C. A., Title 18, § 514; id. U. S. C. seeks not only to punish bigamy or polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household. *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561, 6 Sup. Ct. 278.

Cohabiting with more than one woman within the meaning of this section is a continuous offense, and in returning an indictment the grand jury can not separate such continuing offense into parts and return a count for each of the parts, as for separate offenses. In *re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. 556; *Ex parte Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. 672; *United States v. Eldredge*, 5 Utah 161, 13 Pac. 673; *United States v. Eldredge*, 5 Utah 189, 14 Pac. 42.

An indictment for the offense denounced as polygamy is sufficient if it charges substantially in the language of 7 F. C. A., Title 18, § 513; U. S. C. A., Title 18, § 513; id. U. S. C. *United States v. Tenney*, 2 Ariz. 29, 8 Pac. 295.

Postal Laws, Obstructing Mails.

Indictment charging the retarding of mail trains by certain overt acts in pursuance of a conspiracy need not charge

knowledge that the train carried mails nor that the acts were not done in the exercise of a legal right; and it is not restricted to one overt act, the gist of the offense being conspiracy which is one offense. *United States v. Debs* (D. C.-Ill.), 65 Fed. 210.

Although an indictment for obstructing the mails must allege that the act was done knowingly, wilfully, or unlawfully, it need not allege that it was done feloniously, such offense not having been a felony at common law. *United States v. Debs* (D. C.-Ill.), 65 Fed. 210.

Indictment charging unlawful, knowing, and wilful obstruction of mail by unlawfully, knowingly, and wilfully assaulting and beating the engineer and fireman, without whom it was commonly known the train could not move, was sufficient, without charging that accused knew there was mail on that particular train. *United States v. Hall* (D. C.-Ga.), 206 Fed. 484.

Postal Laws, Using Mails to Defraud.

Indictment under 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C., authorizing the charging in one indictment of as many as three offenses when committed within the same six calendar months. In re Henry, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. 142; Ex parte De Bara, 179 U. S. 316, 45 L. ed. 207, 21 Sup. Ct. 110; *United States v. Nye* (C. C.-Ohio), 4 Fed. 888; In re Haynes (C. C.-Mass.), 30 Fed. 767; *De Bara v. United States* (C. C. A. 6), 99 Fed. 942.

An indictment describing the offense in general language of 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C. was insufficient where the description was not accompanied by a statement of all particulars essential to constitute the scheme to defraud, which were matters of substance, the omission of which was not cured by a verdict of guilty. *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. 571.

Indictment not stating names of those intended to be defrauded or the names and addresses on the letter was sufficient where it alleged that such names and addresses were to the grand jury unknown. *Durland v. United States*, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. 508; *McClendon v. United States* (C. C. A. 8), 229 Fed. 523.

Since enactment of 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C. it is not necessary to allege in the indictment that the scheme was to be effected through and by use of the United States mails, charge of the scheme and actual use of the mails in executing it is sufficient. *United States v. Young*, 232 U. S. 155, 58 L. ed. 548, 34 Sup. Ct. 303; *Ruthven v. United States* (C. C. A. 5), 222 Fed. 70.

In an indictment for falsely pretending to be seeking information for a London attorney so as to lead certain persons to believe they were heirs to large fortunes in England, it was not necessary to negative fact that defendant actually received a letter from a London attorney requesting such information and that he acted in good faith, although defendant could prove such facts as a defense. *United States v. Hoeflinger* (D. C.-Mo.), 33 Fed. 469.

Count in indictment showing the mailing of a letter referring to money already obtained and showing no scheme for obtaining money thereafter is not sufficient. *United States v. Beatty* (C. C.-Vt.), 60 Fed. 740.

An indictment must allege that it was defendant's intention, as a part of his fraudulent scheme, to use the mail. *United States v. Long* (D. C.-Cal.), 68 Fed. 348.

An indictment need not allege an intent by defendants to convert the money obtained to their own use. *United States v. Bernard* (C. C.-N. Y.), 84 Fed. 634.

Averment in indictment that scheme was to be carried out by opening correspondence and inciting others to correspond in reply is not subject to objection of duplicity. *United States v. Bernard* (C. C.-N. Y.), 84 Fed. 634; *Kellogg v. United States* (C. C. A. 2), 126 Fed. 323.

Scheme or artifice to defraud should be so fully stated as to enable the court to see, as a matter of law, that if consummated a fraud would be perpetrated. *United States v. Loring* (D. C.-Ill.), 91 Fed. 881.

When practicable, names of persons intended to be defrauded must be alleged; and averments that the names are unknown, to excuse the omission, must be true. *Larkin v. United States* (C. C. A. 7), 107 Fed. 697.

Use of word "fraudulently" is not alone a sufficient allegation of a fraudu-

lent intent, but circumstances and declared intention must show the act to be such. *United States v. Post* (D. C. Fla.), 113 Fed. 852.

Indictment is not too indefinite and uncertain if it charges the offense with sufficient particulars: (1) To apprise defendant of what he must be prepared to meet, and (2) to make judgment a bar to a second prosecution for the same offense as nothing more is required. *Hume v. United States* (C. C. A. 5), 118 Fed. 689. *Cert. den.* 189 U. S. 510, 47 L. ed. 923, 23 Sup. Ct. 850; *Lonergan v. United States* (C. C. A. 9), 88 Fed. (2d) 591. *Revd. on other grounds*, 303 U. S. 33, 82 L. ed. 630, 58 Sup. Ct. 430; *United States v. Brown* (D. C.-N. Y.), 5 Fed. Supp. 81.

An indictment, wanting in direct, positive, and apt allegations, touching the character of the scheme to defraud, sets forth no offense. *Dalton v. United States* (C. C. A. 7), 127 Fed. 544.

Averment "that the post office establishment of the United States was to be used for purpose of executing" the scheme was sufficient statement of defendants' intention to effect scheme by use of post-office. *Miller v. United States* (C. C. A. 8), 133 Fed. 337.

Merely allegation that defendant is engaged in business of mental healing is not an allegation of a scheme or artifice to defraud. *Post v. United States* (C. C. A. 5), 135 Fed. 1, 70 L. R. A. 989, *revg.* 128 Fed. 950.

Averment that fraudulent scheme was to be effected by the use of the post-office establishment was a distinct averment that it was part of the scheme. *Ewing v. United States* (C. C. A. 9), 136 Fed. 53.

Where indictment charged a scheme to defraud by means of false representations, it was not necessary to allege an intent on the part of the defendant to convert the money so obtained to his own use. *Ewing v. United States* (C. C. A. 9), 136 Fed. 53.

Words "scheme or artifice" constitute no description of the scheme, but pleader must go further and state the facts. *United States v. Etheredge* (C. C.-Ala.), 140 Fed. 376.

Indictment which states what defendant did but not the scheme itself is demurrable. *United States v. Etheredge* (C. C.-Ala.), 140 Fed. 376.

An indictment which states essential elements of offense, not merely in gen-

eral words of statute but with such reasonable particularity as will, in view of presumed innocence of accused, appraise him with reasonable certainty of the nature of the accusation to the end that he may prepare his defense and be able to plead his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and as will enable court to say as a matter of law that facts stated therein would support conviction, is sufficient. *Brown v. United States* (C. C. A. 8), 143 Fed. 60.

Particulars of scheme are matters of substance and must be set out with sufficient certainty to show its existence and character and to fairly acquaint accused what he is required to meet. *Brooks v. United States* (C. C. A. 8), 146 Fed. 223.

Allegations in count respecting the artifices, that they were designed to give one understanding to one class and another understanding to the other, so that neither was given the true meaning and each deceived or defrauded by the same artifices, do not make out separate schemes, but a single scheme calculated to entice in either way. *Gourdain v. United States* (C. C. A. 7), 154 Fed. 453.

Where counts are indefinite and fail to show in what particulars representations were false, defect may be cured by furnishing bill of particulars. *United States v. Palmieri* (C. C.-N. Y.), 169 Fed. 490.

Indictment for using mails to defraud in scheme for sale of corporation stock was good though it did not show that the stock would be valueless or of substantially less value than represented. *United States v. Palmieri* (C. C.-N. Y.), 169 Fed. 490; *Moore v. United States* (C. C. A. 7), 2 Fed. (2d) 839. *Cert. den.* 267 U. S. 598, 69 L. ed. 806, 45 Sup. Ct. 354, 267 U. S. 599, 69 L. ed. 807, 45 Sup. Ct. 354.

It is sufficient to allege that the scheme or artifice to defraud, having been devised by the defendant, was to be effectuated by use of the mails and that the defendant in furtherance of such intention and scheme or artifice, deposited a letter which was delivered by the medium of the post-office. *United States v. Sherwood* (D. C.-N. Y.), 177 Fed. 596.

Whether or not the defendants in good faith believed, or had reason to believe that the alleged statements alleged to be made by them were true, is a matter of defense and not necessary to be nega-

tived in the indictment. *Horn v. United States* (C. C. A. 8), 182 Fed. 721. Cert. den. 219 U. S. 585, 55 L. ed. 347, 31 Sup. Ct. 470.

Second element of the offense denounced by 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C., that defendants intended to effect the scheme or artifice by opening correspondence with the alleged victim of the fraud was properly charged in the indictment. *Rimmerman v. United States* (C. C. A. 8), 186 Fed. 307.

Charging the offense in the language of the statute is not alone sufficient. A good indictment must charge not only that defendant had devised a "scheme or artifice to defraud," but it must also set out what the artifice was and of what the fraud consists. *Etheredge v. United States* (C. C. A. 5), 186 Fed. 434.

An allegation in an indictment clearly putting defendant on notice as to the charge that as a part of the offense he mailed a letter to his intended victim was sufficient to charge that he mailed the letter intending that the same should be delivered by mail. *Dyar v. United States* (C. C. A. 5), 186 Fed. 614; *Belden v. United States* (C. C. A. 9), 223 Fed. 726; *Stern v. United States* (C. C. A. 2), 223 Fed. 762; *Farmer v. United States* (C. C. A. 2), 223 Fed. 903; *Tucker v. United States* (C. C. A. 6), 224 Fed. 833; *Trent v. United States* (C. C. A. 8), 228 Fed. 648; *Robins v. United States*, 262 Fed. 126; *Smith v. United States* (C. C. A. 8), 267 Fed. 665. Reh. den. 269 Fed. 365. Cert. den. 256 U. S. 690, 65 L. ed. 1173, 41 Sup. Ct. 450; *Tincher v. United States* (C. C. A. 4), 11 Fed. (2d) 18; *Gammon v. United States* (C. C. A. 8), 12 Fed. (2d) 226; *Kercheval v. United States* (C. C. A. 8), 12 Fed. (2d) 904; *United States v. Graham* (D. C.-N. Y.), 8 Fed. Supp. 87. See *Ex parte King* (D. C.-Ga.), 200 Fed. 622; *Sandals v. United States* (C. C. A. 6), 213 Fed. 569; *United States v. Young* (D. C.-Wash.), 215 Fed. 267; *Gardner v. United States* (C. C. A. 8), 230 Fed. 575.

A charge that at a particular time defendants had devised a fraudulent scheme, sufficiently charged that they theretofore did devise such scheme. *Wilson v. United States* (C. C. A. 2), 190 Fed. 427. See also *Parker v. United States* (C. C. A. 2), 203 Fed. 950.

An indictment was sufficient which set forth a scheme to advertise for sale at very low prices imaginary improved

ranches, well stocked with poultry, cattle, and other domestic animals and fowl, which purported to be offered for sale by the owners who desired to sell same immediately to any one who might answer the advertisement, the purpose of which was to induce persons to meet the schemer and his agents and thereby be induced by them to purchase the vacant and unimproved lands of the schemer and his corporation at excessive prices. *Hillman v. United States* (C. C. A. 9), 192 Fed. 264. Cert. den. 225 U. S. 699, 56 L. ed. 1263, 32 Sup. Ct. 834.

An indictment is not duplicitous which charges a conspiracy to defraud and a scheme to defraud by the use of the mails, where only one scheme is involved. *Stanley v. United States* (C. C. A. 8), 195 Fed. 896.

An indictment for violation of 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C. is not to be tested for sufficiency by the rules which are applied to indictments for obtaining money under false pretenses. *Emanuel v. United States* (C. C. A. 2), 196 Fed. 317.

No essential element omitted from a charge of a scheme to defraud can be imported into it from subsequent averments of acts done in execution of it, but the subsequent averments of the execution of the scheme may be considered to determine the sense in which the terms which charge the scheme are used. *Hyde v. United States* (C. C. A. 8), 198 Fed. 610.

It is not indispensable that the intent to perpetrate the fraud be alleged in that part of the indictment which charges the commission of the offense; it is sufficient if it is alleged in any part of the indictment. *United States v. Maxey* (D. C.-Ark.), 200 Fed. 997.

Averments in an indictment that the accused, a physician, had devised a scheme to defraud, by stating to one who offered himself as a patient that such person was afflicted with a disease which the physician could cure, and this irrespective of the symptoms, and without any real knowledge of the condition of the patient, and by such statement induced such patient to send him money through the mails, for which he would send in return medicines of little or no value, are sufficient to charge the offense. *United States v. Baxter* (D. C.-Cal.), 221 Fed. 473. See also *United States v. Smith* (D. C.-Pa.), 222 Fed. 165.

The unlawful use of the mails is the gist of the offense must be pleaded with great certainty as to time, place, and circumstance, but the scheme to defraud need not be pleaded with such great certainty. *Colburn v. United States* (C. C. A. 8), 223 Fed. 590; *Gardner v. United States* (C. C. A. 8), 230 Fed. 575; *Whitehead v. United States* (C. C. A. 5), 245 Fed. 385. Cert. den. 245 U. S. 670, 62 L. ed. 540, 38 Sup. Ct. 191; *Cochran v. United States* (C. C. A. 8), 41 Fed. (2d) 193; *Rude v. United States* (C. C. A. 10), 74 Fed. (2d) 673.

Where it appeared that the defendants intended to defraud all persons who should do business with them, and they did not know themselves, when they devised the scheme, the particular persons who would be defrauded, the indictment was not defective in alleging that the defendants defrauded certain named persons and others to the grand jurors unknown. *Mounday v. United States* (C. C. A. 8), 225 Fed. 965; *Ader v. United States* (C. C. A. 7), 284 Fed. 13. Cert. den. 260 U. S. 746, 67 L. ed. 493, 43 Sup. Ct. 247.

A general averment that the defendants devised a scheme to defraud is by itself insufficient, without descriptive details showing its character and that it was reasonably calculated to effect the wrongful design. *Spear v. United States* (C. C. A. 8), 228 Fed. 485.

The scheme itself need not be charged with all the certainty as to time, place, and circumstances requisite in charging the gist of the offense, the mailing of the letter, or other article in execution of the scheme. *Gardner v. United States* (C. C. A. 8), 230 Fed. 575.

An indictment showing that the letter in question was not mailed until after the fraud had been consummated, failed to state an offense. *United States v. Dale* (D. C.-Cal.), 230 Fed. 750.

Soliciting and receiving money from patient by duly qualified physician not without intending to furnish medicine or treatment therefor, but only as a pretext for securing patient's money, without any regard to his need for treatment, is a fraudulent scheme under 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C. Hughes v. United States (C. C. A. 5), 231 Fed. 50. Cert. den. 242 U. S. 640, 61 L. ed. 541, 37 Sup. Ct. 112.

An indictment is not defective in averring a scheme to defraud divers persons,

without naming or describing them or giving a lawful reason for not doing so or stating that their names are to the grand jurors unknown, where the intended victims consisted of a class of individuals. *Finnegan v. United States* (C. C. A. 6), 231 Fed. 561.

Where all of the particulars of devising a scheme to defraud are set out at length in the indictment, the intent to defraud may be inferred from the nature of the scheme itself. *Moffatt v. United States* (C. C. A. 8), 232 Fed. 522.

One who sold "Systematic Remedy" composed of hydrant water, containing some salt and sugar, and some slight traces of calcium and magnesium phosphates, and a very minute trace of boracic acid through the mail was indictable under 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C., where he represented that such remedy had great therapeutic value. *Samuels v. United States* (C. C. A. 8), 232 Fed. 536, Ann. Cas. 1917A, 711.

A count advising defendant with reasonable certainty of the accusation he had to meet was good. *Linn v. United States* (C. C. A. 7), 234 Fed. 543; *Greenbaum v. United States* (C. C. A. 9), 80 Fed. (2d) 113.

A charge under 7 F. C. A., Title 18, § 38; U. S. C. A., Title 18, § 38; id. U. S. C. and one under § 338 for conspiracy may be joined. *Sidebotham v. United States* (C. C. A. 9), 253 Fed. 417; *Sasser v. United States* (C. C. A. 5), 29 Fed. (2d) 76. Cert. den. 279 U. S. 836, 73 L. ed. 983, 49 Sup. Ct. 250.

Indictment was good against objection that its allegations were so broad as to make the range of evidence too broad. *Green v. United States* (C. C. A. 8), 266 Fed. 779. Cert. den. 256 U. S. 689, 65 L. ed. 1173, 41 Sup. Ct. 449.

The indictment need not show that any one actually lost money or was defrauded. *Rowe v. Boyle* (C. C. A. 9), 268 Fed. 809. Cert. den. 254 U. S. 656, 65 L. ed. 460, 41 Sup. Ct. 218.

The scheme need not be pleaded with the certainty required as to mailing. *Savage v. United States* (C. C. A. 8), 270 Fed. 14. Cert. den. 257 U. S. 642, 66 L. ed. 412, 42 Sup. Ct. 52.

Indictment was not bad on ground of impossibility of showing alleged acts were within alleged scheme. *Byron v. United States* (C. C. A. 9), 273 Fed. 769. Cert. den. 257 U. S. 653, 66 L. ed. 418, 42 Sup. Ct. 94.

The indictment need not set out in haec verba the contents of the letters alleged to have been mailed to promote the scheme to defraud. *Wilson v. United States* (C. C. A. 2), 275 Fed. 307. Cert. den. 257 U. S. 649, 66 L. ed. 416, 42 Sup. Ct. 57; *Tenenbaum v. United States* (C. C. A. 5), 11 Fed. (2d) 927; *United States v. Herzig* (D. C.-N. Y.), 26 Fed. (2d) 487; *Stumbo v. United States* (C. C. A. 6), 90 Fed. (2d) 828.

That indictment alleged representations were false and fraudulent did not render indictment duplicitous. *Livezey v. United States* (C. C. A. 5), 279 Fed. 496. Cert. den. 260 U. S. 721, 67 L. ed. 481, 43 Sup. Ct. 12.

Indictment charging the placing of a letter in a post-office was not fatally defective for omitting the language "to be sent or delivered by the post-office establishment of the U. S." *Olsen v. United States* (C. C. A. 2), 287 Fed. 85. But see *United States v. Morse* (D. C.-Conn.), 287 Fed. 906.

It need not be averred that property sold through fraudulent scheme was of less value than price received for it. *United States v. Hersey* (D. C.-Mass.), 288 Fed. 852.

If the scheme or artifice used to defraud be clearly set out in the indictment, and this is followed by the allegation that in the execution of such scheme the post-office department of the United States is used by depositing a letter, the indictment is good against demurrer. *Clark v. United States* (C. C. A. 5), 293 Fed. 301.

Indictment must allege knowledge of falsity of financial statements mailed to secure credit. *United States v. Ball* (D. C.-Pa.), 294 Fed. 750.

Indictment was good against objection that it did not allege facts showing connection between the scheme and the use of the mails. *Headley v. United States* (C. C. A. 5), 294 Fed. 888.

Indictment was not bad for failure to show that defendant expected to obtain some benefit through the carrying out of the alleged fraudulent scheme. *Levinson v. United States* (C. C. A. 6), 5 Fed. (2d) 567. Cert. den. 269 U. S. 564, 70 L. ed. 414, 46 Sup. Ct. 23.

Artifice must be set out but need not be described with particularity. *Redmond v. United States* (C. C. A. 1), 8 Fed. (2d) 24.

While the scheme must be set out in all its essential elements, it need be de-

scribed with no further particularity than required to apprise defendant of the charge. *Redmond v. United States* (C. C. A. 1), 8 Fed. (2d) 24; *Rude v. United States* (C. C. A. 10), 74 Fed. (2d) 673.

The exact date of the formation of the scheme need not be alleged. *Chew v. United States* (C. C. A. 8), 9 Fed. (2d) 348.

Several means used in committing offense may be joined in indictment. *Silkworth v. United States* (C. C. A. 2), 10 Fed. (2d) 711; *Popham v. United States* (C. C. A. 5), 11 Fed. (2d) 966 (several misrepresentations); *Scheib v. United States* (C. C. A. 7), 14 Fed. (2d) 75; *Worthington v. United States* (C. C. A. 7), 64 Fed. (2d) 936.

Guilty knowledge was sufficiently shown by allegations that defendants, at all times mentioned in the indictment, well knew that the substantive scheme set forth was a scheme and artifice to defraud. *Benham v. United States* (C. C. A. 6), 13 Fed. (2d) 558.

Surplusage held not to invalidate indictment. *Tenenbaum v. Snook* (C. C. A. 5), 15 Fed. (2d) 372; *Johnson v. United States* (C. C. A. 9), 59 Fed. (2d) 42. Cert. den. 287 U. S. 631, 77 L. ed. 547, 53 Sup. Ct. 83.

Indictment must give names of persons intended to be defrauded if capable of definite ascertainment. *Berry v. United States* (C. C. A. 5), 15 Fed. (2d) 634.

Inartificially drawn, diffused and redundant indictment was good on general demurrer. *Dysart v. United States* (C. C. A. 5), 17 Fed. (2d) 769. Cert. den. 274 U. S. 755, 71 L. ed. 1334, 47 Sup. Ct. 771.

Indictment alleging the different parts of one complex scheme is not duplicitous. *Sunderland v. United States* (C. C. A. 8), 19 Fed. (2d) 202.

If the gist of the offense, which is the use of the mails in executing the scheme to defraud, is sufficiently set forth, the scheme need not be pleaded with all the certainty as to time, place, and circumstance required in charging the essential element. *Brady v. United States* (C. C. A. 8), 24 Fed. (2d) 397. Cert. den. 278 U. S. 603, 73 L. ed. 537, 49 Sup. Ct. 10. See also *Brady v. United States* (C. C. A. 8), 24 Fed. (2d) 399.

Alternative averment that defendant "deposited, or caused to be deposited" the objectionable letter in the mails was

surplusage. Indictment held sufficient. *Brady v. United States* (C. C. A. 8), 24 Fed. (2d) 397. Cert. den. 278 U. S. 603, 73 L. ed. 531, 49 Sup. Ct. 10.

Indictment charging scheme to defraud insurance company by false representations was sufficient. *Spirou v. United States* (C. C. A. 2), 24 Fed. (2d) 796. Cert. den. 277 U. S. 596, 72 L. ed. 1006, 48 Sup. Ct. 559; *Jamerson v. United States* (C. C. A. 7), 66 Fed. (2d) 569. Cert. den. 290 U. S. 706, 78 L. ed. 606, 54 Sup. Ct. 373.

Indictment was insufficient for indefiniteness in not showing what particular transactions would be brought forward at the trial. *United States v. Smith* (D. C.-Nebr.), 29 Fed. (2d) 926.

Indictment was sufficient though it failed to allege that certain representations were fraudulently made where fraud was inherent in the scheme described. *Link v. United States* (C. C. A. 8), 30 Fed. (2d) 342.

Indictment not insufficient because of using negative pregnant. *Link v. United States* (C. C. A. 8), 30 Fed. (2d) 342.

Indictment held to sufficiently set out scheme to defraud by selling ordinary chicks for pure-bred chicks. *Turner v. United States* (C. C. A. 8), 32 Fed. (2d) 126.

General averments of false representations and allurements without specifically describing them are insufficient. *Beck v. United States* (C. C. A. 8), 33 Fed. (2d) 107.

It is not necessary to allege that the false representations were actually made or intended to be made directly to any person or class of persons. *Hyney v. United States* (C. C. A. 6), 44 Fed. (2d) 134. Cert. den. 283 U. S. 824, 75 L. ed. 1438, 51 Sup. Ct. 347.

The gist of the offense is the use of the mails for the purpose of executing the scheme to defraud, and the scheme need not be pleaded with all the certainty as to time, place, and circumstances required in charging the essential elements of the offense. *Hyney v. United States* (C. C. A. 6), 44 Fed. (2d) 134. Cert. den. 283 U. S. 824, 75 L. ed. 1438, 51 Sup. Ct. 347; *Havener v. United States* (C. C. A. 10), 49 Fed. (2d) 196. Cert. den. 284 U. S. 644, 76 L. ed. 547, 52 Sup. Ct. 24; *Wolpa v. United States* (C. C. A. 8), 86 Fed. (2d) 35, affg. 84 Fed. (2d) 829.

Indictment was good though alleging fraud with respect to several tracts of

land, the scheme to defraud being single. *Sconyers v. United States* (C. C. A. 5), 54 Fed. (2d) 68. Cert. den. 285 U. S. 554, 76 L. ed. 943, 52 Sup. Ct. 410.

Indictment was not objectionable though failing to allege fraudulent intent. *Czarlinsky v. United States* (C. C. A. 10), 54 Fed. (2d) 889. Cert. den. 285 U. S. 549, 76 L. ed. 940, 52 Sup. Ct. 406.

Obvious inconsistency in dates alleged in indictment was immaterial. *Fournier v. United States* (C. C. A. 7), 58 Fed. (2d) 3.

Averment that representations were false and fraudulent was sufficient as an averment that defendant knew of the falsity and intended thereby to deceive. *Armstrong v. United States* (C. C. A. 10), 65 Fed. (2d) 853.

It is not essential that all elements of scheme be pleaded with the technical precision required in alleging substantive offense. *Weber v. United States* (C. C. A. 10), 80 Fed. (2d) 687.

Where indictment charged that defendants did "devise an intent to devise a scheme" to defraud, and that, for the purpose of executing such scheme, they "placed and caused to be placed" a certain letter in the post-office, the use of the word "and" instead of "or" did not constitute a fatal defect. *Wolpa v. United States* (C. C. A. 8), 86 Fed. (2d) 35, affg. 84 Fed. (2d) 829.

The scheme need not be pleaded with technical precision, it is enough if it fairly advises the defendant of the nature of the scheme, thus affording him a fair opportunity to defend. *Goddard v. United States* (C. C. A. 10), 86 Fed. (2d) 884.

An indictment for using the mails to defraud, which charges a scheme to defraud and also sets out a part of the detail of its execution, is not duplicitous. *Muench v. United States* (C. C. A. 8), 96 Fed. (2d) 332.

An indictment against several defendants for using the mails to defraud which charged different offenses in each count by different defendants is not a misjoinder of parties. *United States v. Womack* (C. C. A. 7), 98 Fed. (2d) 742.

Indictment in language of statute alone was insufficient, and bill of particulars would be required. *United States v. Halsey, Stuart & Co.* (D. C.-Wis.), 4 Fed. Supp. 662.

Indictment charging stock-selling scheme, scheme to have corporation declared bankrupt, and scheme to defeat

Bankruptcy Act, by officers of large investment corporation involving many important transactions, did not sufficiently inform defendants of matters they would be required to defend. *United States v. Greve* (D. C.-N. Y.), 12 Fed. Supp. 372.

Defendant was entitled to know approximate time when scheme was devised, but place did not need to be given with particularity. *United States v. National Title Guaranty Co.* (D. C.-N. Y.), 12 Fed. Supp. 473.

Five counts charging violations of 7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C., and six counts charging a conspiracy to violate this statute and the Securities Act of 1933, were sufficient and not duplicitous. *United States v. Bogy* (D. C.-Tenn.), 16 Fed. Supp. 407. Affd. 96 Fed. (2d) 734. Cert. den. 305 U. S. 608, 83 L. ed. 387, 59 Sup. Ct. 68.

Where an agreement between three persons required two of them to make fraudulent representation, it need not be alleged that the third one knew of the fraudulent character of the representations which were made. *Dufour v. United States*, 37 App. D. C. 497.

If the government elects to bring prosecution in the district where the letter was received, the indictment must allege a delivery of the letter at that place. *Hagner v. United States*, 60 App. D. C. 335, 54 Fed. (2d) 446. Affd. 285 U. S. 427, 76 L. ed. 861, 52 Sup. Ct. 417.

Prize Fights.

An indictment under 7 F. C. A., Title 18, § 405; U. S. C. A., Title 18, § 405; id. U. S. C. is sufficient if it plainly and in unambiguous terms gives notice to the defendants of the ultimate facts to be proved, and is so specific and definite as to give no opportunity for a second prosecution for the offense charged. *United States v. Johnston* (D. C.-N. Y.), 232 Fed. 970.

Indictment charging promoter of fight between others with "engaging" in fight was not insufficient. *Dane v. United States*, 57 App. D. C. 161, 18 Fed. (2d) 811. Cert. den. 275 U. S. 538, 72 L. ed. 413, 48 Sup. Ct. 35.

Purloining, Stealing or Injuring Property of the United States.

Indictment under which an assistant postmaster was convicted of embezzling certain moneys of United States was defective in failing to allege that the

funds came into his possession in that capacity. *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. 268.

Where defendant, an assistant postmaster, was indicted and convicted for embezzling money-order funds of the United States, defendant's name need not be correctly spelled in the indictment if substantially the same sound is preserved. *Faust v. United States*, 163 U. S. 452, 41 L. ed. 224, 16 Sup. Ct. 1112.

Offenses under R. S., § 5456 (7 F. C. A., Title 18, § 99; U. S. C. A., Title 18, § 99; id. U. S. C.) and R. S., § 5460 (7 F. C. A., Title 18, § 280; U. S. C. A., Title 18, § 280; id. U. S. C.), relating to taking and embezzlement of gold at United States mint, may be joined in the same indictment. *United States v. Jones* (D. C.-Nev.), 69 Fed. 973.

In describing the property taken in an indictment for violating R. S., § 5456 (7 F. C. A., Title 18, § 99; U. S. C. A., Title 18, § 99; id. U. S. C.) for taking gold from the United States mint all that is necessary is that it be described with sufficient certainty to enable the court to determine that the property is subject to the crime alleged. *United States v. Jones* (D. C.-Nev.), 69 Fed. 973.

Indictment, charging an assistant post-office clerk with embezzlement of money belonging to United States was sufficient. *McBride v. United States* (C. C. A. 8), 101 Fed. 821.

An indictment under 7 F. C. A., Title 18, § 100; U. S. C. A., Title 18, § 100; id. U. S. C. charging defendant with stealing money "belonging to" United States sufficiently averred ownership of the property stolen. *Dimmick v. United States* (C. C. A. 9), 135 Fed. 257.

An indictment for embezzlement under 7 F. C. A., Title 18, § 100; U. S. C. A., Title 18, § 100; id. U. S. C., which did not show that the defendant was an employee of the United States or that the money came lawfully in his possession was insufficient. *United States v. Allen* (D. C.-Ark.), 150 Fed. 152.

It is not necessary to allege that the United States was the sole and exclusive owner of the entire property in the thing, if the United States has the actual rightful possession and is the owner of a special property in the thing of value stolen, it is all-sufficient. *United States v. Kambeitz* (D. C.-N. Y.), 256 Fed. 247.

Indictment must charge that the property belonged to the United States. *Thompson v. United States* (C. C. A. 2),

256 Fed. 616. Cert. den. 249 U. S. 617, 63 L. ed. 804, 39 Sup. Ct. 391.

In indictment for larceny it is sufficient to allege ownership in the lawful possession of the goods, whether such owner has legal title or not. *Fowler v. United States* (C. C. A. 9), 273 Fed. 15.

Indictment, under 7 F. C. A., Title 18, § 100; U. S. C. A., Title 18, § 100; id. U. S. C., characterizing conversion as a wrongful or fraudulent appropriation, is sufficient. *Weinhandler v. United States* (C. C. A. 2), 20 Fed. (2d) 359. Cert. den. 275 U. S. 554, 72 L. ed. 423, 48 Sup. Ct. 116.

Rape.

Indictment under 7 F. C. A., Title 18, § 458; U. S. C. A., Title 18, § 458; id. U. S. C., charging carnally knowing a female under 16 years of age, need not allege that the act was done with the girl's consent. *Callahan v. United States* (C. C. A. 9), 240 Fed. 683.

Receiving Stolen Goods.

It is not essential to allege in an indictment for receiving stolen goods (7 F. C. A., Title 18, § 467; U. S. C. A., Title 18, § 467; id. U. S. C.) that the property was received without the consent of the owner or with the intent to deprive him of its use and benefit, the criminal intent and evil purpose of the receiver being sufficiently alleged where his act is characterized as unlawful and felonious. *Bise v. United States* (C. C. A. 8), 144 Fed. 374, 7 Ann. Cas. 165.

Congress defined the crime as the "receipt or purchase of stolen property by one having a knowledge of the theft." It might have denounced as a crime the receipt of stolen property under conditions sufficient to create a suspicion in the mind of a reasonable man, but it did not do so. *Peterson v. United States* (C. C. A. 9), 213 Fed. 920.

The crimes of larceny and receiving stolen goods with knowledge that they have been stolen are of the same class and are closely connected, and counts for the separate crimes may be included in one indictment. *Milner v. United States* (C. C. A. 5), 293 Fed. 590.

Robbery.

Court-martial specifications charging soldier with taking property "from the presence" of another, feloniously and by putting him in fear, were sufficient to charge robbery. *Collins v. McDonald*, 258 U. S. 416, 66 L. ed. 692, 42 Sup. Ct. 326.

An indictment charging the crime against the accused in the words of the statute is sufficient, and though the indictment alleges assault, the charge is robbery where the indictment also charges that defendants did wilfully, unlawfully, and feloniously rob. *Vane v. United States* (C. C. A. 9), 254 Fed. 32.

Sailors, Abandonment.

7 F. C. A., Title 18, § 486; U. S. C. A., Title 18, § 486; id. U. S. C. enumerates three separate and distinct offenses: (1) Maliciously and without justifiable cause forcing any officer or mariner on shore in any foreign country; (2) maliciously and without justifiable cause leaving such officer or mariner behind in any foreign port; and (3) maliciously and without justifiable cause refusing to bring home again all officers and mariners of the ship in a condition to return and willing to return on the homeward voyage. *United States v. Netcher* (C. C.-Mass.), Fed. Cas. No. 15866, 1 Story 307.

Sailors, Maltreatment.

Negligence is not an element of liability under this section and can be the basis of a prosecution only if it was wilful and malicious. *T. F. Oakes* (D. C.-N. Y.), 82 Fed. 759; *United States v. Reed* (C. C.-N. Y.), 86 Fed. 308.

7 F. C. A., Title 18, § 482; U. S. C. A., Title 18, § 482; id. U. S. C. describes four distinct offenses: 1. Beating and wounding; 2. imprisoning; 3. deprivation of suitable food and nourishment, and 4. infliction of cruel and unusual punishment. Each of these is a substantial criminal act, when proceeding from malice, and without justifiable cause, and one of these offenses can not be properly described in the indictment by words used in the act to describe another offense. *United States v. Collins* (C. C.-R. I.), Fed. Cas. No. 14836, 2 Curt. 194.

Ships, Negligent Operation.

It is not sufficient under 7 F. C. A., Title 18, § 461; U. S. C. A., Title 18, § 461; id. U. S. C. that the officer has been guilty of negligence and inattention to duty, but human life must have been destroyed. *In re Doig* (C. C.-Cal.), 4 Fed. 193.

An indictment against a captain of a steamboat, which alleges that the steamboat was at the time navigating Chesapeake Bay between Baltimore and Annapolis, in substance alleges that the

steamboat was being used on the navigable waters of the United States. *United States v. Beacham* (C. C.-Md.), 29 Fed. 284.

An indictment under 7 F. C. A., Title 18, § 461; U. S. C. A., Title 18, § 461; id. U. S. C., to be sufficient, should state the fact upon which the charge is based; and it is not sufficient if it merely allege that a certain person lost his life by the negligence, misconduct, and inattention to duty on the part of the defendant. *United States v. Holtzhauer* (C. C.-N. J.), 40 Fed. 76. But see *United States v. Collyer* (C. C.-N. Y.), Fed. Cas. No. 14838, Whart. Hom. 483.

Criminal intent of the party accused is not an essential matter of allegation in the indictment. *United States v. Holmes* (C. C.-Ohio), 104 Fed. 884.

Where several persons are jointly indicted under this statute, it need not be shown that the loss of life was due to their joint negligence. *United States v. Collyer* (C. C.-N. Y.), Fed. Cas. No. 14838.

Motive or intent on the part of the person charged is not a part of the crime to be alleged or proved. In re Charge to Grand Jury (D. C.-La.), Fed. Cas. No. 18253, 1 Newb. 323.

Ships, Sinking or Plundering.

An indictment sufficiently discloses an overt act in carrying out a conspiracy to violate 7 F. C. A., Title 18, § 488; U. S. C. A., Title 18, § 488; id. U. S. C. by plundering a wrecked vessel, where it alleges that one of the defendants "furnished and loaned" to the other defendants "a certain skiff to be used by them * * * in plundering said goods and merchandise from the said steamboat." *United States v. Sanche* (C. C.-Tenn.), 7 Fed. 715.

An offense is committed if the goods are taken either directly from the wrecked vessel, or out of the water while they are floating near it, or after they have been cast upon the shore. The specific intent required to convict for larceny is not essential here, for any intent with which the plundering, stealing, or destroying may be done is unlawful. *United States v. Stone* (C. C.-Tenn.), 8 Fed. 232.

Indictment must show that there was insurance on the vessel or freight belonging to another person than the owner or that there were passengers on

board, or some other fact showing that the owner had no right to cast away the vessel. *United States v. Murphy* (D. C.-Ala.), 50 Fed. (2d) 455.

A destruction of the ship is not an essential ingredient of the crime, for if the combination or conspiracy to destroy the vessel or its cargo exists, the offense is then complete, whatever may be the outcome of the conspiracy. *United States v. Cole* (C. C.-Ohio), Fed. Cas. No. 14832, 5 McLean 513.

The intent with which the alleged conspiracy was entered into is an essential ingredient of the crime, and this must have been an intent to injure underwriters. A conspiracy to burn a vessel is not enough without the named intent. *United States v. Hand* (C. C.-Ohio), Fed. Cas. No. 15296, 6 McLean 274. See *United States v. Morris* (D. C.-Md.), Fed. Cas. No. 15812.

Where the offense of wilfully setting fire to a ship at sea with intent to sink her was charged in the indictment in the words of 7 F. C. A., Title 18, § 492; U. S. C. A., Title 18, § 492; id. U. S. C., the allegation was sufficient without adding the word feloniously. *United States v. McAvoy* (C. C.-N. Y.), Fed. Cas. No. 15654, 4 Blatchf. 418, 18 How. Prac. 380.

Allegations of indictment that money was taken from wrecked vessel was sufficiently sustained by evidence that the vessel at the time of the "plundering" was stranded upon the beach or shore. *United States v. Pitman* (D. C.-Mass.), Fed. Cas. No. 16051, 1 Spr. 196. See also *United States v. Coombs*, 12 Pet. (37 U. S.) 72, 9 L. ed. 1004.

Treason or Rebellion.

An indictment charging that the three defendants (naming them) "did conspire" means that they agreed together or among themselves. *Wright v. United States* (C. C. A. 5), 108 Fed. 805. Cert. den. 181 U. S. 620, 45 L. ed. 1031, 21 Sup. Ct. 924.

Indictment charging that a newspaper publication was treasonable in intent, purpose, and effect, was good as against demurrer. *United States v. Werner* (D. C.-Pa.), 247 Fed. 708.

Indictment and evidence was sufficient to sustain conviction of conspiracy "by force to seize, take, or possess any property of the United States contrary to the authority thereof." *Phipps v. United States* (C. C. A. 4), 251 Fed. 879.

Though indictment charged conspiracy to overthrow and destroy the government and to wage war against the United States, it was sufficient to establish either. *Bryant v. United States* (C. C. A. 5), 257 Fed. 378.

Averment that offense was committed "on or about the 5th day of April, 1917," was sufficiently definite in respect to time. *Bryant v. United States* (C. C. A. 5), 257 Fed. 378.

An indictment which warns defendant of what he will be called upon to meet at the trial and puts him in possession of the facts charged so as to enable him to prepare his defense is sufficient. *Wells v. United States* (C. C. A. 9), 257 Fed. 605.

Indictment for conspiracy by members of I. W. W. to forcibly oppose authority of United States and prevent, hinder, and delay execution of its laws for prosecuting war, and finally to overthrow the government, was sufficient. *Anderson v. United States* (C. C. A. 9), 269 Fed. 65. Cert. den. 255 U. S. 576, 65 L. ed. 794, 41 Sup. Ct. 447. Compare with *Anderson v. United States* (C. C. A. 8), 273 Fed. 20. Cert. den. 257 U. S. 647, 66 L. ed. 415, 42 Sup. Ct. 56.

Unlawful Purchase, Pledge, or Embezzlement of Military or Naval Equipment.

In prosecution for illegal purchasing oats from a sergeant and soldier in the quartermaster department of the army, indictment alleging purchase during the months of April and May was not subject to the objection that more than one offense was charged in the same count. *Eisenberg v. United States* (C. C. A. 5), 261 Fed. 598.

Indictment under 7 F. C. A., Title 18, § 87; U. S. C. A., Title 18, § 87; id. U. S. C., charging that defendants knowingly applied to their own use and sold the property in question was sufficient though it did not show how the property came into the possession of defendants. *Horowitz v. United States* (C. C. A. 2), 262 Fed. 48. Cert. den. 252 U. S. 586, 64 L. ed. 729, 40 Sup. Ct. 396.

Indictment describing property merely as "certain property of the United States," was fatally defective after verdict. *Edwards v. United States* (C. C. A. 4), 266 Fed. 848.

White Slave Traffic—Mann Act.

Under statutory condemnation of "any other immoral purpose," an indictment is

sufficient which sets out that the woman was persuaded to go from one state to another for the purpose of engaging "in illicit intercourse, cohabitation, and concubinage with accused." *United States v. Flaspoller* (D. C.-La.), 205 Fed. 1006.

Where, in the indictment, defendant was first charged in the language of the statute with a violation of the statute, and then to make it more specific the way and manner of the violation was specifically pointed out, such indictment was good. *Weddel v. United States* (C. C. A. 8), 213 Fed. 208.

The statute does not require the indictment to charge that the woman or girl, transported in violation of this law, was actually subjected to debauchery, or that she did actually engage in prostitution. The purpose of the statute was to prevent the transportation for immoral purposes. *United States v. Brand* (D. C.-N. Y.), 229 Fed. 847.

Indictment substantially following the statute was held good. *United States v. Brand* (D. C.-N. Y.), 229 Fed. 847; *Huffman v. United States* (C. C. A. 8), 259 Fed. 35.

Allegation that transportation was unlawfully and feloniously made "for the purpose of debauchery" sufficiently alleges the criminal intent. *Ammerman v. United States* (C. C. A. 8), 262 Fed. 124. Cert. den. 253 U. S. 495, 64 L. ed. 1030, 40 Sup. Ct. 587.

Indictment sufficiently charging transportation for purpose of prostitution and debauchery is not rendered bad by the additional words "and other immoral purposes." *United States v. Hobbs* (D. C.-Fla.), 287 Fed. 157.

Indictment in the words of the statute is sufficient. Averment that transportation was by common carrier is not necessary under 7 F. C. A., Title 18, § 398; U. S. C. A., Title 18, § 398; id. U. S. C. The age of prosecutrix need not be alleged. It is not necessary to allege the meaning of the word "debauchery," where the meaning appears from the facts averred. *Blain v. United States* (C. C. A. 8), 22 Fed. (2d) 393.

Averment of several means of committing offense denounced by 7 F. C. A., Title 18, § 398; U. S. C. A., Title 18, § 398; id. U. S. C. did not render indictment duplicitous. *Blain v. United States* (C. C. A. 8), 22 Fed. (2d) 393.

Counts of indictment charging defendant with aid in procuring tickets and with persuading and inducing the

named parties to go from one place to another charged separate offenses under 7 F. C. A., Title 18, §§ 398, 399; U. S. C. A., Title 18, §§ 398, 399; id. U. S. C. Kavalin v. White (C. C. A. 10), 44 Fed. (2d) 49.

Indictment alleging transportation of women for "concubinage, debauchery and other immoral purposes," was sufficient in employing the word "debauchery" but

insufficient as to other quoted words. King v. United States (C. C. A. 10), 55 Fed. (2d) 1058.

Indictment alleging purpose and intent to transport a female for purpose of prostitution and debauchery, sufficiently alleged that the act was "knowingly" done. United States v. Otero (D. C.-Tex.), 5 Fed. Supp. 201.

730. Indictment Containing More than One Count—Using the Mails to Defraud.

UNITED STATES OF AMERICA, }
 — DISTRICT OF —, } ss:
 — DIVISION. }

FIRST COUNT

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the — District of —, — Division, at the September Term of said court in the year 19—, and inquiring for said division and district, upon their oath present, that — and —, defendants, each late of the City of —, in said division and district, on January 1, 19—, at — aforesaid, in said division and district, did devise a scheme and artifice for obtaining money, by means of false and fraudulent pretenses and representations, from persons residing within the United States who should desire to purchase shares of corporate stocks upon the installment plan hereinafter described; that is to say, said defendants, under the name of —, according to said scheme and artifice, were to and did falsely and fraudulently pretend and represent to the public and to the divers individuals in this indictment hereafter named, through and by means of divers printed circulars and advertisements, and divers letters, contract coupons, dividend memoranda and checks, and statements of account, that they were carrying on, at — aforesaid, the business of buying, through stock exchanges, and holding for their customers, until fully paid for by such customers, shares of stock dealt in upon stock exchanges, upon a plan, called a Systematic Saving Plan, involving the payment, by the customer, to said —, of a portion of the purchase money upon giving his order, and of other portions thereof from time to time until the shares purchased by him were fully paid for, together with a "service" fee, said —, undertaking and promising, in consideration of said service fee, actually to secure such shares, through a stock exchange, at the time of such purchase and order, hold the same until fully paid for, and then deliver the same to the purchaser their customer; but, notwithstanding such pretenses and representations, said defendants, according to said scheme and artifice, upon securing the moneys of their customers for the purposes aforesaid, would not, and did not, at the time of such purchase

and order, or at any time, make any purchases whatever of any shares of stock for such customers, or have or hold any such shares for such customers, or do anything whatever for them in exchange for their moneys, and would and did convert such moneys to the own use of them the said defendants and so defraud said customers thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, afterwards, to wit, on July 30, 19—, at — aforesaid, in said — Division of said — District of —, so having devised said scheme and artifice for obtaining money by means of the false and fraudulent pretenses and representations aforesaid, for the purpose and with the intent then and there on their part of executing that scheme and artifice, unlawfully and feloniously did place, in the post office of the United States there, to be sent and delivered by the post office establishment of the United States, a certain circular, to wit, a printed circular of four pages, too voluminous to be here set forth in full, beginning, on the first page thereof, with the words following, to wit:

and ending, on the last page thereof, with the following words, to wit:

which said circular, when the same was so deposited in said post office, was enclosed in an envelope bearing a United States two-cent postage-stamp and the following return-card, to wit:

and was directed to one —, one of the persons whose money was so to be obtained, by the following direction and address upon said envelope, to wit:

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said — and — so having devised the scheme and artifice in the first count of this indictment described, afterwards, to wit, on —, 19—, at — aforesaid, in said — Division of said — District of —, for the purpose and with the intent then and there on their part of executing the same scheme and artifice, unlawfully and feloniously did place, in the post office of the United States there, to be sent and delivered by the post office establishment of the United States to one — another

of said persons whose money was so to be obtained, a certain letter, to wit, a letter of the tenor following:

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said — and — afterwards, to wit, on — —, 19—, so having devised the scheme and artifice for obtaining money by means of the false and fraudulent pretenses and representations aforesaid, for the purpose of executing that scheme and artifice, unlawfully and feloniously did place, in the post office of the United States there, to be sent and delivered by the post office establishment of the United States to one — at — aforesaid, who was another of said persons whose money was so to be obtained, a certain dividend memorandum, to wit, a dividend memorandum of the tenor following:

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTH COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said — and —, throughout the period of time extending from — —, 19—, to — —, 19—, at — aforesaid, in said — Division of said — District of —, unlawfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit divers, to wit, one thousand, offenses against the United States, among which were the several offenses described in the several counts of this indictment preceding this count, and each of which said one thousand offenses, according to said unlawful and felonious conspiracy, combination, confederation and agreement, was to consist in placing, in the post office of the United States at — aforesaid, to be sent and delivered by the post office establishment of the United States, and for the purpose of executing the scheme and artifice for obtaining money by means of false and fraudulent pretenses and representations described in the first count of this indictment, either a letter, a circular or an advertisement, directed to one of the persons from whom such money was so to be obtained.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement, during

said period of time, did do among many others certain acts; that is to say, said defendants, at the several times and places in that behalf mentioned in the several counts of this indictment preceding this count, did place in the post office of the United States at — aforesaid, the circular, letter and dividend memorandum mentioned in said several counts: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

United States attorney.

Source of Form.

Kriebel v. United States (C. C. A. 7),
8 Fed. (2d) 692.

Cross-Reference.

In connection with Forms 730 to 740,
see notes to Form 729.

731. Indictment under Internal Revenue Laws—Failure to Pay Special Tax.

UNITED STATES OF AMERICA, }
DISTRICT OF —. } ss:

At the — Court of the United States of America, for the district of —, begun and held at —, within and for said district, on the — day of — in the year of our Lord one thousand nine hundred and —.

The grand jurors of the United States of America, for the district of — aforesaid, on their oath, present, that — of —, in the said district of —, on the — day of — in the year of our Lord nineteen hundred and —, and on divers other days between the day last aforesaid and the day of the finding of this indictment, at — in said district of — did knowingly and unlawfully exercise and carry on the business of a — without having then and there paid the special tax in that behalf by law required, against the peace and dignity of the said United States and contrary to the form of the statute of the said United States in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said — on the first day of — in the year of our Lord one thousand nine hundred and — at — establishment or place of business in — in said district, being then and there a person engaged in a business who is thereby made liable to a special tax, to wit: the business of a — did then and there wilfully neglect and refuse to place and keep conspicuously in — said establishment or place of business, the stamp denoting the payment of said special tax, — against the peace and dignity of the said United States, and contrary to the form of the statute of the said United States, in such case made and provided.

United States attorney.

Statutory References.

Limitations of action, 7 F. C. A., Title
18, § 585; U. S. C. A., Title 18, § 585;
id. U. S. C.

Posting of special tax stamps, 6A, F.
C. A., Title 26, §§ 3273, 3274; U. S. C. A.,
Title 26, §§ 3273, 3274; id. U. S. C.

732. Indictment under Internal Revenue Laws Relative to Intoxicating Liquors.

District Court of the United States

_____ District of _____

_____ Term, 19—, held at _____

The grand jurors of the United States of America, impaneled, sworn, and charged to inquire within and for the _____ District of _____, upon their oaths do find and present:

That, heretofore, to wit: on and about the _____ day of _____, 19—, before the finding of this indictment, in said _____ District of _____, and within the jurisdiction of this court, one _____, _____, _____, and _____ late of said _____ District of _____, unlawfully, wilfully, and feloniously did possess a quantity of distilled spirits, to wit, — gallons more or less, of whiskey, without the immediate container thereof having affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Liquor Taxing Act,

Title II, section 201.

United States attorney.

Filed in open court this _____ day of _____, 19—.

Note.

For present law of similar nature, see 6A, F. C. A., Title 26, § 2803; U. S. C. A., Title 26, § 2803; id. U. S. C.

Statutory Reference.

Limitations of action, 7 F. C. A., Title 18, § 585; U. S. C. A., Title 18, § 585; id. U. S. C.

NOTES TO DECISIONS

In General.

Indictment charging all elements of offense was not defective by its failure to negative exception stated in 6A, F. C. A., Title 26, § 2803 (a); U. S. C. A., Title 26, § 2803 (a); id. U. S. C. Wheeler v. United States (C. C. A. 5), 80 Fed. (2d) 678.

Conspiracy.

In a prosecution for conspiracy to violate this and other sections dealing with distilled spirits, a count was not duplicitous because it charged a single agreement to commit more than one offense. United States v. Goldsmith (C. C. A. 2), 91 Fed. (2d) 983. Cert. den. 302 U. S. 718, 82 L. ed. 555, 58 Sup. Ct. 38.

733. Indictment for Illegally Procuring Certificate of Naturalization.

District Court of the United States

_____ District of _____

At a stated term of the District Court of the United States of America for the _____ District of _____, begun and held at _____, within and for the district aforesaid, on the _____ of _____, in the year of our Lord one thousand nine hundred and _____, before the Honorable _____, Judge of the said court.

— District of —, ss:

The grand jurors of the United States of America, within and for the district aforesaid, then and there sworn and charged to inquire for the said United States of America and for the body of said district, do upon their oaths, present that —, alias —, at —, in the said — District of —, and within the jurisdiction of this court, heretofore, to wit, on or about the — day of —, 19—, being an alien, did then and there, in order to procure a certificate of naturalization of the United States of America, knowingly, wilfully, and fraudulently make, execute, and file, in duplicate, a petition, in writing, signed by the said —, alias —, in his own handwriting and duly verified by him, in which said petition the said —, alias — stated his place of birth to be —, —, and that he emigrated from said —, —, to the United States, and that he renounced absolutely and forever all allegiance and fidelity to any foreign nation, potentate, state, or sovereignty, and particularly —, the country of which he alleged to be a citizen at the time of making said petition, when in fact —.

That in pursuance to and in reliance upon the allegations contained in the petition of the said —, alias —, a certificate of naturalization, No. —, was issued to the said —, alias —; contrary to the form of the statute of the United States in such case made and provided, to wit, U. S. C., Title —, section —, and against the peace and dignity of the said United States of America.

Attorney of the United States in
and for the — District of —.

Statutory Reference.

See 2 F. C. A., Title 8, § 414; U. S. C. A., Title 8, § 414; id. U. S. C.; 7 F.

C. A., Title 18, §§ 141, 142; U. S. C. A., Title 18, §§ 141, 142; id. U. S. C.

NOTES TO DECISIONS

In General.

One swearing falsely, either in state or federal court, is punishable under 7 F. C. A., Title 18, § 142; U. S. C. A., Title 18, § 142; id. U. S. C. Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. 588, 19 Ann. Cas. 778.

Where it is claimed that the accused swore falsely in his application for naturalization, an indictment under this section need not set out the declaration so sworn to. United States v. Walsh (C. C.-Mass.), 22 Fed. 644.

It can not be said that the fraud in the procurement of the certificate of citizenship consisted in the fact that a person obtained citizenship papers who was not legally entitled to them, but that the means by which they were so

obtained is unknown, since the means resorted to is the very thing which must be alleged. United States v. Lehman (D. C.-Mo.), 39 Fed. 768.

An indictment must allege that the object of a conspiracy charged to violate this section was that the defendants, or some of them, should obtain, accept, or receive certificates of citizenship for themselves. United States v. Melfi (D. C.-Del.), 118 Fed. 899.

If the state statute requires an affidavit in naturalization proceedings additional to the statement required by the federal laws to be made under oath, prosecution for the false making of such additional affidavit can not be had in the federal courts. United States v. Severino (C. C.-N. Y.), 125 Fed. 949.

Perjury in making petition required by New York naturalization law was not punishable in federal courts under 7 F. C. A., Title 18, § 142; U. S. C. A., Title 18, § 142; id. U. S. C. United States v. Severino (C. C.-N. Y.), 125 Fed. 949.

7 F. C. A., Title 18, § 142; U. S. C. A., Title 18, § 142; id. U. S. C. covered all cases of false swearing in naturalization proceedings, committed in whatever court. Schmidt v. United States (C. C. A. 9), 133 Fed. 257.

False swearing in naturalization proceedings that applicant had not previously claimed exemption from military service to United States on ground that

he was an alien, was material, and a violation of 7 F. C. A., Title 18, § 142; U. S. C. A., Title 18, § 142; id. U. S. C. Hauge v. United States (C. C. A. 9), 276 Fed. 111.

False testimony at hearing before assistant director of naturalization constituted perjury. Gaglione v. United States (C. C. A. 1), 35 Fed. (2d) 496.

A false answer by a witness that he had never been arrested is material in a naturalization hearing and violates 7 F. C. A., Title 18, § 142; U. S. C. A., Title 18, § 142; id. U. S. C. Rein v. United States (C. C. A. 3), 69 Fed. (2d) 206.

734. Indictment for Perjury.

Violates: U. S. C., Title 18, section 231
District Court of the United States

_____ District of _____
_____ Division

At a stated term of said court, begun and holden at the city of _____, county of _____, within and for the _____ Division of the _____ District of _____ on the _____ day of _____ in the year of our Lord one thousand nine hundred and _____:

The grand jurors for the United States of America, impaneled and sworn in the _____ Division of the _____ District of _____, upon their oath present:

That on the _____ day of _____, 19— a certain investigation came on to be heard in the city of _____, county of _____, within the _____ Division of the _____ District of _____ before the Securities and Exchange Commission, said Securities and Exchange Commission then and there having full and competent power and jurisdiction to conduct said investigation, that thereupon the circumstances surrounding the organization, the incorporation, and the operation of _____ Oil Company, a _____ corporation, and the connection of one, AB, with said corporation became and were then and there material questions in said investigation:

That thereupon AB hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the _____ Division of the _____ District of _____, was then and there called and produced as a witness in said investigation, and as such witness in said investigation was duly sworn by CD, an officer of said Securities and Exchange Commission designated to conduct said investigation, to testify the truth, the whole truth, and nothing but the truth, the said CD as such officer being then and there duly authorized and empowered under the laws of the United States of America to administer such oath, and said defendant being then and there a witness in said investigation and

being so duly sworn as aforesaid did, on said — day of —, 19—, and at a duly-adjoined hearing on said investigation on the — day of —, 19— knowingly, wilfully, corruptly, feloniously, and falsely depose and say in substance that he did not organize, incorporate, nor operate said corporation, nor cause it to be organized, incorporated, nor operated, and that he had nothing to do with said corporation, and that he had no connection with said corporation:

Whereas in truth and in fact said defendant caused said — Oil Company to be organized and incorporated and operated, and whereas in truth and in fact said defendant requested one, EF, to become an incorporator, director, and officer of said corporation, and to transfer to said corporation certain properties in which said defendant had a beneficial interest, and whereas in truth and in fact said defendant was authorized to and did sign checks, drafts, and other documents for and on behalf of said corporation, and whereas in truth and in fact said defendant did participate in the operation of said corporation. In all of which particulars the testimony, statements, and declarations so testified and deposed unto by the said defendant were then and there material matter in and to said investigation so heard as aforesaid, and were then and there not true but false, and were then and there by said defendant not believed to be true but were then and there by him believed to be false.

And so the grand jurors aforesaid upon their oaths aforesaid do say that on the — day of —, 19— and on the — day of —, 19— as aforesaid in the — Division of the — District of — said defendant did knowingly, falsely, corruptly, and feloniously commit wilful and corrupt perjury in and by his oath so taken as aforesaid.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A true bill.

United States attorney.

Foreman.

Assistant United States attorney.

Note.

From record in *Woolley v. United States*, 305 U. S. 614, 83 L. ed. 391, 59 Sup. Ct. 73. Demurrer overruled and motion to quash denied.

Statutory Reference.

For other notes to decisions concerning form and sufficiency of indictments for perjury and subornation of perjury, see 7 F. C. A., Title 18, §§ 231, 232, 558, 559; U. S. C. A., Title 18, §§ 231, 232, 558, 559; id. U. S. C.

NOTES TO DECISIONS

In General.

Indictment for perjury upon affidavit before Kentucky justice of peace supporting a claim against United States, was a case within purview of federal law. *United States v. Bailey*, 9 Pet. (34 U. S.) 238, 9 L. ed. 113.

An indictment for perjury need not refer to the act of Congress which required the oath to be taken. *United States v. Nickerson*, 17 How. (58 U. S.) 204, 15 L. ed. 219.

Defendant must have been sworn to sustain indictment for false answers in

deposition. *United States v. McConaughy* (D. C.-Ore.), 33 Fed. 168.

An allegation that defendant wilfully and corruptly swore to material matter which he knew to be false is sufficient to show that he did believe it to be true. *United States v. Cuddy* (D. C.-Cal.), 39 Fed. 696.

Perjury can only be assigned upon an oath authorized by a law of the United States, and rules and regulations of commissioner of general land office are not laws within meaning of 7 F. C. A., Title 18, § 231; U. S. C. A., Title 18, § 231; id. U. S. C. *United States v. Manion* (D. C.-Wash.), 44 Fed. 800.

Perjury can not be assigned on matters not required by law to be sworn to, nor material, nor where one administering oath was without authority to do so. *United States v. Bedgood* (D. C.-Ala.), 49 Fed. 54.

False statements before notary in postal investigation can not be basis of indictment for perjury because notary had no power to administer oaths in such cases. *United States v. Law* (D. C.-Va.), 50 Fed. 915.

Where alleged false oath was not material to issue, indictment not good on demurrer. *United States v. Pettus* (C. C.-Tenn.), 84 Fed. 791.

Indictment for perjury sufficiently averred materiality of false testimony. *United States v. Ammerman* (D. C.-Ark.), 176 Fed. 635. Revd. on other grounds 185 Fed. 1.

Indictment must describe matter relative to which falsehood was made sufficiently to show its materiality. *Hogue v. United States* (C. C. A. 5), 184 Fed. 245.

Indictment for perjury committed before a senate subcommittee was sufficient to show that the chairman of the committee was chosen as such, but insufficient to show the materiality of the questions propounded to the witness. *United States v. Seymour* (D. C.-Nebr.), 50 Fed. (2d) 930.

Mere conclusions of a witness can not be made the basis of a perjury prosecution. *United States v. Otto* (C. C. A. 2), 54 Fed. (2d) 277.

Indictment was not open to the objection of indefiniteness and uncertainty. *Asgill v. United States* (C. C. A. 4), 60 Fed. (2d) 776.

Bankruptcy Proceedings.

Indictment under this section covers false oaths in bankruptcy proceedings. *Wechsler v. United States* (C. C. A. 2), 158 Fed. 579.

Indictment for perjury growing out of false testimony at bankruptcy examination was sufficient. *Daniels v. United States* (C. C. A. 6), 196 Fed. 459.

False swearing in a bankruptcy proceeding is governed by the provisions of the Bankruptcy Act, and not by 7 F. C. A., Title 18, § 231; U. S. C. A., Title 18, § 231; id. U. S. C. *Rosenthal v. United States* (C. C. A. 8), 248 Fed. 684.

Indictment charging the giving of false testimony before special commissioner acting under § 21 of Bankruptcy Act (3 F. C. A., Title 11, § 44; U. S. C. A., Title 11, § 44; id. U. S. C.) was sufficient in its designation of office of commissioner, and not bad for duplicity in designating both Title 18, § 231 and Title 11, § 44, as the law violated. *Magen v. United States* (C. C. A. 2), 24 Fed. (2d) 325. Cert. den. 277 U. S. 595, 72 L. ed. 1005, 48 Sup. Ct. 530.

Concerning Public Lands.

Indictment for perjury in connection with statement made by defendant in land contest involved "Timber Culture Act" was insufficient. *United States v. Shinn* (C. C.-Ore.), 14 Fed. 447.

Indictment for perjury upon oath in connection with homestead did not sufficiently allege that defendant was sworn to affidavit, and demurrer thereto was properly sustained. *United States v. Hearing* (C. C.-Ore.), 26 Fed. 744.

False swearing in connection with homestead entry must be shown to be material in indictment for perjury. *United States v. Singleton* (D. C.-Ala.), 54 Fed. 488.

Subscribing as well as swearing to affidavit before land office official was not essential to indictment for subornation of perjury in alleged procuring false affidavits to be made in connection with homestead entry. *Nurnberger v. United States* (C. C. A. 8), 156 Fed. 721.

Indictment for perjury, for false swearing in connection with homestead entry, was sufficient. *Barnard v. United States* (C. C. A. 9), 162 Fed. 618.

The pleader may either set out the facts from which the materiality appears, as a matter of law, or he may directly aver the materiality without setting forth the probative or circumstantial

facts. *United States v. Nelson* (D. C.-Idaho), 199 Fed. 464; *Baskin v. United States* (C. C. A. 7), 209 Fed. 740; *Berry v. United States* (C. C. A. 9), 259 Fed. 203.

Elements of Offense.

A purpose to defraud the United States is not an element of the crime defined in 7 F. C. A., Title 18, § 231; U. S. C. A., Title 18, § 231; *id.* U. S. C. *United States v. Noveck*, 271 U. S. 201, 70 L. ed. 904, 46 Sup. Ct. 476; *United States v. Atkins* (D. C.-Mass.), Fed. Cas. No. 14474, 1 Spr. 558.

Allegation that false oath was wilfully taken was essential in indictment for perjury. *United States v. Edwards* (C. C.-Ala.), 43 Fed. 67.

The crime of perjury in an affidavit is complete the moment the oath is taken with the necessary intent. It is immaterial and irrelevant that the false affidavit is never used. *Steinberg v. United States* (C. C. A. 2), 14 Fed. (2d) 564.

Because of not correctly naming court where cause was pending, so accused could plead autrefois acquit or autrefois convict, indictment was insufficient. *United States v. Johnson* (D. C.-Ind.), 33 Fed. (2d) 222.

Strict common-law requirements as to indictment are not now applicable. *Danaher v. United States* (C. C. A. 8), 39 Fed. (2d) 325.

Knowledge of the falsity of the oath is essential to the crime, and an essential allegation of an indictment therefore. *United States v. Babcock* (C. C.-Mich.), Fed. Cas. No. 14488, 4 McLean 113.

Exemption from Military Service.

Where it was alleged that the affidavit was subscribed and sworn to, and that the associate member of the legal advisory board administered the oath to the defendant, and that in the affidavit hereinbefore referred to defendant, having taken oath to testify to matters referred to in the affidavit, falsely and knowingly stated in effect, that he had a wife who was dependent upon his labor for support, it sufficiently showed that it was the defendant who had subscribed to the affidavit. *Whiteside v. United States* (C. C. A. 9), 257 Fed. 509.

Miscellaneous Cases.

Motion to quash indictment for perjury in making false returns under oleo-

margarine law granted. *United States v. Lamson* (C. C.-R. I.), 165 Fed. 80.

Indictment of candidate for United States senator for perjury in making false statements under Corrupt Practices Act did not charge an offense. *United States v. Cameron* (D. C.-Ariz.), 282 Fed. 684.

An indictment for perjury in making an oath to an income tax return which merely avers that the computation of the tax from figures set out in the return, none of which are alleged to be false and fraudulent, is incorrect, is insufficient to charge an offense. *United States v. Demos* (D. C.-Fla.), 291 Fed. 104.

Indictment charging police lieutenant with perjury before grand jury investigating illegal possession of government guns and evidence was sufficient. *Clai-borne v. United States* (C. C. A. 8), 77 Fed. (2d) 632.

Indictment charging defendant with swearing falsely that machine guns were to be exported and consequently were not subject to tax imposed by 6A F. C. A., Title 26, § 3407; U. S. C. A., Title 26, § 3407; *id.* U. S. C. was not demurrable. *United States v. Abelow* (D. C.-N. Y.), 14 Fed. Supp. 304.

Naturalization.

Where charge of perjury is founded on alleged false statements of the accused in his declaration of intention to become citizen of United States, the indictment need not set forth the declaration itself. *United States v. Walsh* (C. C.-Mass.), 22 Fed. 644.

Facts stated in indictment for false statement in naturalization petition, as to petitioner's residence, constituted crime of perjury. *United States v. Du Pont* (D. C.-Ore.), 176 Fed. 823.

Pension Claims.

Indictment for perjury in deposition before pension examiner was sufficient. *Markham v. United States*, 160 U. S. 319, 40 L. ed. 441, 16 Sup. Ct. 288.

Indictment of defendant for perjury in making pension claim contained sufficient averment of official character of officer taking affidavit thereon. *United States v. Boggs* (D. C.-Ill.), 31 Fed. 337.

Subornation of Perjury.

Indictment for subornation of perjury under 7 F. C. A., Title 18, §§ 231, 232; U. S. C. A., Title 18, §§ 231, 232; *id.* U. S. C., in connection with false affidavits

before local land office officials was sufficient. *Babcock v. United States* (C. C.-Colo.), 34 Fed. 873.

Indictment for subornation of perjury must contain allegation of lawfulness of the giving of false testimony for this is an element of offense of perjury. *United States v. Howard* (D. C.-Tenn.), 132 Fed. 325.

Wilfulness.

Allegation in indictment for perjury that oath was taken corruptly did not sufficiently allege wilfulness. *United States v. Edwards* (C. C.-Ala.), 43 Fed. 67.

Omission to charge that defendant took oath, alleged to be false, "wilfully," was fatal to indictment. *United States v. Lake* (D. C.-Ark.), 129 Fed. 499.

735. Indictment for Selling Liquor Without Payment of Tax.

UNITED STATES OF AMERICA, }
 — DISTRICT OF —. } ss:

In the — Court of the United States, held at —, — Term, in the year of our Lord nineteen hundred and —

The grand jurors of the United States of America for the — District of —, impaneled and sworn and charged to inquire in and for — District of —, on their oaths do present, that —, late of the district aforesaid, on the — day of —, in the year of our Lord nineteen hundred and —, in the district aforesaid, did then and there carry on the business of a retail liquor dealer, and the said — had not then and there made payment of the special tax as in that behalf required, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

United States attorney for the aforesaid district.

Witnesses: —.

—.
 —.

736. Indictment for Counterfeiting Coin.

UNITED STATES OF AMERICA, }
 — DISTRICT OF —. } ss:

No. —

In the — Court of the United States, within and for the — District of —, of the term of —, in the year of our Lord one thousand nine hundred and —

FIRST COUNT

The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the said — District, upon their oaths, present that — now or late of —, in the county of —, at —, in the county of —, in the said — District of —, and within the jurisdiction of this court, heretofore, to wit, on the — day of —,

in the year of our Lord one thousand nine hundred and —, did then and there knowingly, wrongfully, and unlawfully, falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly aid and assist in falsely making, forging, and counterfeiting — certain false, forged, and counterfeited coin—, each of which said false, forged, and counterfeited coin— was then and there in the resemblance and similitude of the silver coins which had theretofore been coined at the mints of the United States, and called — he—, the said —, then and there knowing the said false, forged, and counterfeit coin— to be then and there false, forged, and counterfeit, with the intent of said — then and there to defraud one — contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

And the jurors aforesaid, upon their oaths aforesaid, do further present that — now or late of —, in the county of —, at —, in the county of —, in the said — District of — and within the jurisdiction of this court, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, did then and there knowingly, wrongfully, and unlawfully have in h— possession — certain false, forged, and counterfeited coin—, each of which said false, forged, and counterfeited coin— was then and there in the resemblance and similitude of the silver coins which had theretofore been coined at the mints of the United States, and called — he—, the said—, then and there knowing the said false, forged, and counterfeited coin to be then and there false, forged, and counterfeit, with the intent of h— said — then and there to defraud one — contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

And the jurors aforesaid, upon their oaths aforesaid, do further present that — now or late of —, in the county of —, at —, in the county of —, in the said — District of —, and within the jurisdiction of this court, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, did then and there knowingly, wrongfully, and unlawfully pass, utter, and publish — certain false, forged, and counterfeited coin—, each of which said false, forged, and counterfeited coin— was then and there in the resemblance and similitude of the silver coins which had theretofore been coined at the mints of the United States, and called — he—, the said —, then and there knowing the said false, forged, and counterfeited coin— to be then and there false, forged, and counterfeit, with the intent of h— said — then and there to defraud one — contrary to the form of the statute in such

case made and provided, and against the peace and dignity of the United States.

United States attorney.

Statutory Reference.

See 7 F. C. A., Title 18, §§ 277 to 286;
U. S. C. A., Title 18, §§ 277 to 286; id.
U. S. C.

NOTES TO DECISIONS

In General.

An indictment under 7 F. C. A., Title 18, § 277; U. S. C. A., Title 18, § 277; id. U. S. C. charging that defendant "did falsely make, forge, and counterfeit four pieces of silver coin, of the coinage of the United States, called a dollar" is sufficient after verdict. *United States v. Otey* (C. C.-Ore.), 31 Fed. 68.

Principle that in prosecution for counterfeiting there must be a specification of the particular coin counterfeited followed in prosecution for mailing letter giving information for preventing conception. *United States v. Pupke* (D. C.-Mo.), 133 Fed. 243.

Indictment for unlawfully, feloniously, and knowingly making and forging 110 coins in the similitude of a dollar was good although it failed to allege whether they were gold or silver dollars. *Hauger v. United States* (C. C. A. 4), 173 Fed. 54.

It is not necessary, in order to charge a crime under 7 F. C. A., Title 18, § 277; U. S. C. A., Title 18, § 277; id. U. S. C., that the indictment should negative the fact that the coins appellant possessed or uttered were not minor coins of the United States, when they were described as being in the likeness and similitude of the silver coin of the United States, which has been coined at the mints of the United States, commonly called a dollar. *Linningen v. Morgan* (C. C. A. 8), 241 Fed. 645.

Indictment charging counterfeiting of dollar, 50 cent and 25 cent coins, was based on 7 F. C. A., Title 18, § 277; U. S. C. A., Title 18, § 277; id. U. S. C., and not § 278, in view of 9 F. C. A., Title 31, § 317; U. S. C. A., Title 31, § 317; id. U. S. C., defining minor coins. *Miraglio v. United States* (C. C. A. 8), 20 Fed. (2d) 908.

Designation of coins alleged to have been counterfeited as 50 cent pieces and 25 cent pieces is not a fatal defect in

that they are not so called in the statute authorizing their coinage. *United States v. Burns* (C. C.-Ohio), Fed. Cas. No. 14691, 5 McLean 23.

On trial for counterfeiting coin, averments that the coins were in the likeness and similitude of genuine coins must be sustained by proof. *United States v. Burns* (C. C.-Ohio), Fed. Cas. No. 14691, 5 McLean 23.

The punishment for forging old five cent pieces had to be sought under R. S., § 5457 (7 F. C. A., Title 18, § 277; U. S. C. A., Title 18, § 277; id. U. S. C.), and not under R. S., § 5458 (§ 278), since minor coins did not contain silver. *United States v. Bicksler*, 1 Mackey (12 D. C.) 341.

To convict of possession of counterfeit money with intent to defraud, it is unnecessary that there be a consummation of the fraud by actually passing the money. *United States v. Bicksler*, 1 Mackey (12 D. C.) 341.

Information.

Under U. S. Const., Amend. 5, the United States can not proceed by information instead of indictment to try one charged with violating this section, the offenses declared being infamous crimes. *United States v. Petit*, 114 U. S. 429, 29 L. ed. 93, 5 Sup. Ct. 1190. But see *United States v. Yates* (D. C.-N. Y.), 6 Fed. 861; *United States v. Field* (C. C.-Vt.), 16 Fed. 778.

Since passing counterfeit trade dollars was not an infamous crime, the federal Constitution was not violated by a prosecution therefor upon information filed by the district attorney. *United States v. Yates* (D. C.-N. Y.), 6 Fed. 861.

Joinder.

Several separate counts, each of which alleges possession of a different denomination of coin, may be joined in an indictment for possession of counterfeit

coin. *United States v. Howell* (D. C.-Del.), 65 Fed. 402.

A count for aiding and assisting in making false coins and one for procuring them to be made may be added to counts charging the making of such coin. *United States v. Burns* (C. C.-Ohio), Fed. Cas. No. 14691, 5 McLean 23.

The distinct offenses of passing counterfeit coin at different times may be included in the same indictment. *United States v. O'Callahan* (C. C.-Ohio), Fed. Cas. No. 15910, 6 McLean 596.

Jurisdiction.

Indictment lies, under state statute, for counterfeiting United States coin. *Ex parte Geisler* (C. C.-Tex.), 50 Fed. 411; *Chess v. State*, 1 Blackf. (Ind.) 198; *Dashing v. State*, 78 Ind. 357; *State v. McPherson*, 9 Iowa 53; *Martin v. State*, 18 Tex. App. 224. See also *Sexton v. California*, 189 U. S. 319, 47 L. ed. 833, 23 Sup. Ct. 543.

Indictment for passing counterfeit coin need not aver that the offense was committed in territory within the jurisdiction of the United States. *Campbell v. United States* (D. C.-Va.), Fed. Cas. No. 2373, 10 Law Rep. 400.

Federal courts have exclusive authority to punish the crime of counterfeiting United States coin, but not the crime of having possession of implements adapted to counterfeiting coin with intent to use them therefor. *State v. Brown*, 2 Ore. 221.

Counterfeiting coin of the United States or passing or keeping it with intent to circulate it is not an offense exclusively cognizable in the federal courts. *Sizemore v. State*, 3 Head (40 Tenn.) 26.

Knowledge and Intent.

To change any metal to resemble a coin by any process or by coloring it is violative of this section, regardless of innocent intent or ignorance of the law. *United States v. Russell* (C. C.-Mass.), 22 Fed. 390.

To constitute the crime of passing counterfeit coin there must be an intent to deceive; and the mere act of passing such coin once is not of itself evidence of a purpose to deceive; but the manner of doing it and the attendant circumstances may be considered. *United States v. Hopkins* (D. C.-N. Car.), 26 Fed. 443.

The indictment need not specifically allege an intent to defraud, such intent,

if an element of the crime, being implied in the allegation of "falsely" making. *United States v. Otey* (C. C.-Ore.), 31 Fed. 68.

Averment of passing counterfeit coins "with intent to defraud" is sufficient without setting out the facts going to prove the intent or the particular means by which the intent was to be effected. *McCarty v. United States* (C. C. A. 8), 101 Fed. 113.

On charge of violating 4 Stat. 121 prohibiting false making, forging, or counterfeiting of silver coin, intent in making such coin to fraudulently pass it as genuine must be shown; and one making it for another purpose, though the purpose is not defensible morally, is not guilty. *United States v. King* (C. C.-Ohio), Fed. Cas. No. 15535, 5 McLean 208.

Under R. S., § 5457 (7 F. C. A., Title 18, § 277; U. S. C. A., Title 18, § 277; id. U. S. C.) scienter was necessary to be averred and proved, but this was not necessary under R. S., § 5458 (§ 278). *United States v. Bicksler*, 1 Mackey (12 D. C.) 341.

In a prosecution under 7 F. C. A., Title 18, § 278; U. S. C. A., Title 18, § 278; id. U. S. C. for possession with intent to defraud, knowledge of the falsity of the coin need not be alleged or proved. *United States v. Bicksler*, 1 Mackey (12 D. C.) 341.

Naming Person Defrauded.

In prosecution under Act Mar. 3, 1825, § 21, 4 Stat. 121, for passing and uttering counterfeit five cent pieces, where the indictment named the one intended to be defrauded, it did not need to name the one to whom the coin was passed. *United States v. Bejandio* (C. C.-La.), Fed. Cas. No. 14561, 1 Woods 294.

An indictment under Act Mar. 3, 1825, § 20, 4 Stat. 121, for counterfeiting coin did not need to charge that the offense was committed with intent to pass as true nor with intent to defraud anyone. *United States v. Peters* (D. C.-Mich.), Fed. Cas. No. 16035, 2 Abb. N. S. 494.

In prosecution for possession of counterfeit money with intent to defraud, the name of the person to be defrauded need not be averred, his description as "a certain person to the jurors unknown" or "whomsoever he might be able to defraud" being sufficient. *United States v. Bicksler*, 1 Mackey (12 D. C.) 341.

737. Indictment for Smuggling.

UNITED STATES OF AMERICA, } ss:
 — DISTRICT OF —.

In the — Court of the United States, in and for the — District aforesaid, at the — Term thereof, 19—.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that — on the — day of —, in the year of our Lord nineteen hundred —, in the said district and within the jurisdiction of said court, did then and there knowingly, wilfully, feloniously, and unlawfully with the intent to defraud the United States of America and the revenue thereof, smuggle and clandestinely introduce into the United States of America, to wit, into the collection district of — in the — District of —, and within the jurisdiction of this court, certain goods, wares, and merchandise, to wit: [Here insert] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

United States attorney.

Cross-Reference.

Smuggling narcotics, Form 738.

Statutory Reference.

See 6A, F. C. A., Title 19, § 1593 et seq.; U. S. C. A., Title 19, § 1593 et seq.; id. U. S. C.

NOTES TO DECISIONS**In General.**

In an indictment for smuggling opium, a description of the property as "prepared opium, subject to duty by law, to wit, the duty of twelve dollars per pound," is a sufficient description of the article made dutiable by paragraph 48 of the Tariff Act of 1890. *Dunbar v. United States*, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. 325.

Indictment must charge that liquor concealed had been unlawfully imported. *Shillitani v. United States* (C. C. A. 2), 279 Fed. 393; *Hogan v. United States* (C. C. A. 5), 48 Fed. (2d) 516. *Cert. den.* 284 U. S. 668, 76 L. ed. 565, 52 Sup. Ct. 42.

Indictment will lie though goods are not unladen. *Gillespie v. United States* (C. C. A. 2), 13 Fed. (2d) 736.

Indictment for facilitating transportation and concealment of smuggled whisky held to state offense under 6A, F. C. A., Title 19, § 1593; U. S. C. A., Title 19, § 1593; id. U. S. C. *Gillespie v. United States* (C. C. A. 2), 13 Fed. (2d) 736.

To charge an offense for concealing and selling imported merchandise unlawfully, the merchandise must be alleged to have been unlawfully imported and defendants to have known this. *Hartson v. United States* (C. C. A. 2), 14 Fed. (2d) 561.

The expression "knowingly, wilfully and unlawfully received liquor that had been theretofore unlawfully imported" was defective for failure to aver that the defendant knew the liquor had been unlawfully imported. *Crank v. United States* (C. C. A. 9), 61 Fed. (2d) 620.

While it would be better pleading to incorporate the words "fraudulently" and "knowingly" in that part of the indictment which charged the conspiracy, if the context contains or imports a fair equivalent of these words or either of them, the indictment is not fatally defective. *Wishart v. United States* (C. C. A. 8), 29 Fed. (2d) 103.

Indictment for "smuggling" intoxicating liquors was sufficient after verdict without specific averment of unlawful

intent. *Musey v. United States* (C. C. A. 5), 37 Fed. (2d) 673.

Indictment involving many defendants was bad for duplicity. *Curtis v. United States* (C. C. A. 5), 38 Fed. (2d) 450. Cert. den. 281 U. S. 768, 74 L. ed. 1175, 50 Sup. Ct. 467.

Count charging bringing of merchandise into the country in violation of the Tariff Act, and count charging concealment of same merchandise, consisting of

liquors, was not duplicitous as charging offenses under both the Tariff Act and the National Prohibition Act; and the indictment did not charge the same offense in different counts. *Krench v. United States* (C. C. A. 6), 42 Fed. (2d) 354.

Indictment for conspiracy to smuggle liquor was sufficient to support removal to another district for trial. *Kearns v. Keville* (C. C. A. 1), 67 Fed. (2d) 566.

738. Indictment for Smuggling Opium.

———— Court of the United States

———— Term, 19—.

UNITED STATES OF AMERICA, }
 — DISTRICT OF —, } ss:
 — DIVISION. }

The grand jurors of the United States, chosen, selected, and sworn, in and for the — Division of the — District of —, upon their oaths present:

That heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, one — late of said — Division of the — District of —, did within the said division and district, and within the jurisdiction of this court, then and there fraudulently, wilfully, knowingly, unlawfully, and feloniously import, smuggle, and clandestinely bring into the United States of America from a foreign port and place, to wit, —, certain merchandise of foreign growth and manufacture, to wit, — pounds of opium prepared for smoking purposes, the said opium being then and there subject to duty by law, and the duty thereon not having been paid or secured to be paid to the United States, he, the said —, then and there bringing the said opium into the United States, as aforesaid, without making any report to the collector of customs for the district of —, or to any officer of the customs, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, one — late of said — Division of the — District of — did then and there knowingly, fraudulently, unlawfully, wilfully, and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign growth and manufacture, to wit, — pounds of opium prepared for smoking purposes, after the said opium had been smuggled and clandestinely brought into the United States without the duty thereon having been paid or secured to be paid to the United States,

the said opium being then and there subject to duty by law; that the said opium, prior to the time when the said — did receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale thereof, as aforesaid, had been fraudulently, knowingly, wilfully, unlawfully, and feloniously imported, smuggled, and clandestinely brought into the United States of America, in the said District of —, at the time aforesaid, from —, a foreign country, by some person or persons to the grand jurors unknown, without the duty thereon having been paid or secured to be paid to the United States, the said opium being then and there subject to duty by law, and without any report having been made to the collector of customs, or to any officer thereof for the district of —, of the importation of said opium; he, the said — at the time he did receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of said opium, well knowing that the same had been imported, as aforesaid, into the United States contrary to law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

United States attorney.

By—

Assistant United States attorney.

Cross-Reference.

General indictment for smuggling,
Form 737.

Statutory Reference.

See 5 F. C. A., Title 21, § 174; U. S.
C. A., Title 21, § 174; id. U. S. C.

NOTES TO DECISIONS

In General.

It is not necessary to allege that one charged with the offense of unlawful purchase, disposition, and distribution of opium, is required to register. *Sam Wong v. United States* (C. C. A. 9), 2 Fed. (2d) 969.

Indictment failing to designate place where the crime was committed was insufficient. *Skelley v. United States* (C. C. A. 10), 37 Fed. (2d) 503. Compare *Fiddelke v. United States* (C. C. A. 9), 47 Fed. (2d) 751.

Indictment charging the transportation, concealment, and sale of a certain quantity of narcotic drugs, to wit: 74 ounces of morphine, a derivative of opium, and 23 ounces of cocaine did not sufficiently identify the offense. *Hood v. United States* (C. C. A. 10), 43 Fed. (2d) 353.

An indictment may not be insufficient although it does not allege the particular time and place where the crime was com-

mitted. *Fiddelke v. United States* (C. C. A. 9), 47 Fed. (2d) 751.

Indictment alleging purchase of opium "at Chicago, Ill.," was sufficiently specific as to place of offense. *Miller v. United States* (C. C. A. 7), 53 Fed. (2d) 316.

Indictment charging concealment and conspiracy to conceal narcotic drugs "at the southern district of New York and within the jurisdiction of this court," sufficiently described the place of concealment. *United States v. Busch* (C. C. A. 2), 64 Fed. (2d) 27. Cert. den. 290 U. S. 627, 78 L. ed. 546, 54 Sup. Ct. 65.

Concluding words of indictment charging defendant with facilitating sale of unlawfully imported narcotics, reading, "all of which the said defendants then and there well knew," were sufficient to satisfy statutes. *Jindra v. United States* (C. C. A. 5), 69 Fed. (2d) 429. Cert. den. 292 U. S. 651, 78 L. ed. 1501, 54 Sup. Ct. 869.

Latitude in allegation touching date of importation from July 1, 1913, to June 10, 1931, was cured, if cure be needed, by bill of particulars which fixed date at April 28, 1931. *Jindra v. United States* (C. C. A. 5), 69 Fed. (2d) 429. Cert. den. 292 U. S. 651, 78 L. ed. 1501, 54 Sup. Ct. 869.

Absolute and certain knowledge need not be shown. *Jindra v. United States* (C. C. A. 5), 69 Fed. (2d) 429. Cert. den. 292 U. S. 651, 78 L. ed. 1501, 54 Sup. Ct. 869.

Where an indictment charges the kind and quantity of opium sold, the date and place of sale, and the name of the purchaser in each instance, defendant is not entitled to a bill of particulars, which would virtually detail the evidence upon which the government would rely. *Hood v. United States* (C. C. A. 10), 76 Fed. (2d) 275.

Indictment need not allege manner in which narcotic drug was unlawfully brought into the United States. *Hood v. United States* (C. C. A. 10), 78 Fed. (2d) 150.

Conspiracy.

An indictment for conspiracy to commit an offense under 5 F. C. A., Title 21, § 174; U. S. C. A., Title 21, § 174; id. U. S. C., need not with technical precision allege all the essential elements to the commission of the offense as would be necessary in an indictment for the substantive offense. *Wong Tai v. United States*, 273 U. S. 77, 71 L. ed. 545, 47 Sup. Ct. 300.

An indictment that charges one defendant with performing the overt act in a conspiracy to violate 5 F. C. A., Title 21, § 174; U. S. C. A., Title 21, § 174; id. U. S. C. is sufficient since the overt act of one is the act of all. *Jung Quey v. United States* (C. C. A. 9), 222 Fed. 766. See *Louie v. United States* (C. C. A. 9), 218 Fed. 36.

The fact that the words "after being imported" are omitted from an indictment charging defendants with conspiracy to violate the provision of 5 F. C. A., Title 21, § 174; U. S. C. A., Title 21, § 174; id. U. S. C., concerning the concealing of opium does not make the indictment void for uncertainty. *Shepard v. United States* (C. C. A. 9), 236 Fed. 73.

Joinder.

Where an indictment contains two counts, each charging a violation of a different act, and each offense contains elements not found in the other, although the transaction charged in each is the same, a verdict of guilty as to one is not inconsistent with a verdict of not guilty as to the other. *Lee Choy v. United States* (C. C. A. 9), 293 Fed. 582.

An indictment charging different offenses under 5 F. C. A., Title 21, § 174; U. S. C. A., Title 21, § 174; id. U. S. C. in one count, and following the words of the statute, is not void for duplicity. *Yip Wah v. United States* (C. C. A. 9), 8 Fed. (2d) 478. Cert. den. 270 U. S. 645, 70 L. ed. 777, 46 Sup. Ct. 336.

Two counts may be joined in one indictment although one count charges a violation of 7 F. C. A., Title 28, § 174; U. S. C. A., Title 28, § 174; id. U. S. C., and the other charges a violation of 6 F. C. A., Title 26, § 692; U. S. C. A., Title 26, § 692; id. U. S. C., since both crimes are of the same class. *Perez v. United States* (C. C. A. 9), 10 Fed. (2d) 352; *Foster v. United States* (C. C. A. 9), 11 Fed. (2d) 100; *Copperthwaite v. United States* (C. C. A. 6), 37 Fed. (2d) 846.

An indictment in three counts, one charging purchase of morphine, the second charging possession, and the third charging sale of the morphine, charges three separate offenses, which are subject to separate penalties. *Walsh v. White* (C. C. A. 8), 32 Fed. (2d) 240.

739. Indictment for Selling Liquor to Indians.

UNITED STATES OF AMERICA, }
 — DISTRICT OF —, } ss:
 — DIVISION. }

In the — Court of the United States of America, at a regular term thereof, begun and held at the city of —, in the — District of —

on the — day of —, in the year of our Lord one thousand nine hundred and —.

FIRST COUNT

The grand jurors of the United States, chosen, selected, and sworn in and for the said — District of —, upon their oaths, present that — late of the — District of —, in the county of — in said district, heretofore, to wit, on the — day of — in the year of our Lord, one thousand nine hundred and —, within the county of —, in the — District of — aforesaid, and within the jurisdiction of this court, did then and there wrongfully and unlawfully give, sell, and dispose of certain spirituous, vinous, malt, and other intoxicating liquors, to wit, — pint of whisky, — pint of brandy, — pint of gin, — pint of beer, — pint of ale, and — pints of other spirituous, malt, vinous, and intoxicating liquors of the value of — dollars (\$—) each, to one — an Indian of the — tribe of Indians, said Indian then and there being a ward of the government of the United States under the charge of an Indian superintendent or agent of the United States, having lands allotted to him in severalty, the title thereto being then and there held in trust by the government of the United States for said Indian, over which said Indian the government of the United States through its departments then and there exercised guardianship, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

SECOND COUNT

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say, that —, late of the — District of —, in the county of — in said district, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, within the county of —, in the — District of — aforesaid, and within the jurisdiction of this court, did then and there wrongfully and unlawfully give, sell, and dispose of certain spirituous, vinous, malt and other intoxicating liquors, to wit, — pint of whisky, — pint of brandy, — pint of gin, — pint of beer, — pint of ale, and — pints of other spirituous, malt, vinous, and intoxicating liquors of the value of — dollars (\$—) each, to one —, an Indian of the — tribe of Indians, said Indian then and there being a ward of the government of the United States under the charge of an Indian superintendent or agent of the United States, having lands allotted to him in severalty, the title thereto being then and there held in trust by the government of the United States for said Indian, over which said Indian the government of the United States through its departments then and there exercised guardianship, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

THIRD COUNT

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say, that —, late of the — District of —, in the county of — in said district, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, within the county of —, in the — District of — aforesaid, and within the jurisdiction of this court, did then and there wrongfully and unlawfully give, sell, and dispose of certain spirituous, vinous, malt, and other intoxicating liquors, to wit, — pint of whisky, — pint of brandy, — pint of gin, — pint of beer, — pint of ale, and — pints of other spirituous, malt, vinous, and intoxicating liquors of the value of — dollars (\$—) each, to one —, an Indian of the — tribe of Indians, said Indian then and there being a ward of the government of the United States under the charge of an Indian superintendent or agent of the United States, having lands allotted to him in severalty, the title thereto being then and there held in trust by the government of the United States for said Indian, over which said Indian the government of the United States through its departments then and there exercised guardianship, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

FOURTH COUNT

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say, that —, late of the — District of —, in the county of — in said district, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, within the county of —, in the — District of — aforesaid, and within the jurisdiction of this court, did then and there wrongfully and unlawfully give, sell, and dispose of certain spirituous, vinous, malt, and other intoxicating liquors, to wit, — pint of whisky, — pint of brandy, — pint of gin, — pint of beer, — pint of ale, and — pints of other spirituous, malt, vinous, and intoxicating liquors of the value of — dollars (\$—) each, to one —, an Indian of the — tribe of Indians, said Indian then and there being a ward of the government of the United States under the charge of an Indian superintendent or agent of the United States, having lands allotted to him in severalty, the title thereto being then and there held in trust by the government of the United States for said Indian, over which said Indian the government of the United States through its departments then and there exercised guardianship, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

FIFTH COUNT

And the grand jurors aforesaid, on their oaths aforesaid, do further present that the said —, late of the — District of —, in the county

of — in said district, heretofore, to wit, on the — day of —, in the year of our Lord one thousand nine hundred and —, at the — Indian Reservation, in the county of —, in the state of —, and the — District of — aforesaid, and within the jurisdiction of this court, did then and there wrongfully and unlawfully introduce into Indian Territory, to wit, into and upon the — Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the — Indians, certain spirituous, vinous, malt, and other intoxicating liquors, to wit, — pint of whiskey, — pint of brandy, — pint of gin, — pint of beer, — pint of ale, and — pints of other spirituous, malt, vinous, and intoxicating liquors of the value of — dollars (\$—) each, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, to wit, an Act of Congress approved January 30, 1897, U. S. C., Title 25, section 241, and against the peace and dignity of the United States.

United States attorney.

Statutory Reference.

See 5 F. C. A., Title 25, §§ 241 to 254;
U. S. C. A., Title 25, §§ 241 to 254; id.
U. S. C.

NOTES TO DECISIONS

In General.

Indictment charging sale to Indians unknown sufficiently charged an offense. *Foerster v. United States* (C. C. A. 8), 116 Fed. 860. Cert. den. 187 U. S. 644, 47 L. ed. 347, 23 Sup. Ct. 844.

An indictment charging defendant with carrying liquor into what was formerly Indian Territory "from without such Indian country" is sufficient to charge an offense against 5 F. C. A., Title 25, § 241a; U. S. C. A., Title 25, § 241a; id. U. S. C. *Collins v. Morgan*, (C. C. A. 8), 243 Fed. 495.

Allegations in indictment that one Bud Scheff did sell and give away intoxicating liquor to one Fannie Lasley in Oklahoma county. Western District of Oklahoma, said Fannie Lasley then and there being an Osage Indian, an allottee of land held in trust by the government; that she was a ward of the government in charge of an Indian superintendent, were sufficient for identification. *Doyle v. United States* (C. C. A. 8), 33 Fed. (2d) 263.

It is not necessary to allege the quantity sold in the indictment. *Parris v. United States*, 1 Ind. Terr. 43, 35 S. W. 243.

An indictment charging that defendant introduced "certain ardent spirits, ale, beer, wine and intoxicating liquor, into the Indian country" is not indefinite and uncertain as charging more than one offense. *Parris v. United States*, 1 Ind. Terr. 43, 35 S. W. 243.

An indictment which uses the word "introduce" instead of the words "to carry or have carried into" as used in 5 F. C. A., Title 25, § 241a; U. S. C. A., Title 25, § 241a; id. U. S. C. is sufficient. *United States v. Buckles*, 6 Ind. Terr. 319, 97 S. W. 1022.

In an indictment under 5 F. C. A., Title 25, § 241a; U. S. C. A., Title 25, § 241a; id. U. S. C. it is not necessary to insert the name of the person to whom the liquor was sold. *Parmenter v. United States*, 6 Ind. Terr. 530, 98 S. W. 340.

Joinder.

Where one count of an indictment for introducing liquor into Indian country charged one defendant as principal and the other as accessory, and another count charged both as principals, it was not error to deny motion to require government to elect upon which count it relied.

Rooney v. United States (C. C. A. 9), 203 Fed. 928.

5 F. C. A., Title 25, §§ 241, 241a; U. S. C. A., Title 25, §§ 241, 241a; id. U. S. C. create distinct offenses, and an indictment that charges a violation of both statutes is clearly duplicitous. Allison v. United States (C. C. A. 8), 216 Fed. 329.

An indictment was not bad for duplicity, in that it charged the introduction of the liquor into Indian reservation as well as the allotment; nor was it bad because there was no allegation that the title to the land was held in trust by the government. Estes v. United States (C. C. A. 8), 225 Fed. 980.

Joinder of conspiracy and substantive crimes was proper and not duplicitous. Perry v. United States (C. C. A. 8), 18 Fed. (2d) 477.

A charge of transportation and a charge of possession stated separate offenses. McMillan v. United States (C. C. A. 8), 27 Fed. (2d) 94.

Time and Place.

Indictment not subject to demurrer because it did not designate the particular location in the Indian country within the

named district. United States v. Luther (D. C.-Okla.), 260 Fed. 579.

A variance in the indictment as to the name of the county into which the liquor was introduced is not fatal when both counties are within the Indian Territory, and the same court would have jurisdiction over both counties. Flack v. United States (C. C. A. 8), 272 Fed. 680.

Indictment must set forth substantial identifying facts as to time, place, and occasion of possession. Lynch v. United States (C. C. A. 8), 10 Fed. (2d) 947.

Indictment was sufficient as against contention that it did not describe particularly the place of the offense and that it was duplicitous. McMillan v. United States (C. C. A. 8), 27 Fed. (2d) 94.

Indictment alleging possession of intoxicating liquors "about ten miles northeast of the city of Pawhuska, Osage County, State of Oklahoma" was sufficient. Johnson v. United States (C. C. A. 8), 32 Fed. (2d) 127.

Indictment need not state whether the offense was committed in the day-time or night-time or allege the precise place within a city block where the offense was committed. Tiller v. United States (C. C. A. 10), 34 Fed. (2d) 398.

740. Indictment for Conspiracy.

District Court of the United States

_____ District of _____

_____ Division

_____ Term, 19—

_____ District of _____, }
_____ Division. } ss:

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the _____ Division of the _____ District of _____, at the _____ Term of said court in the year 19—, and inquiring for said division and district, upon their oath present:

That heretofore, to wit, on _____, 19—, there was issued by the District Court of the United States of America for the district of _____, under the provisions of that certain law of the United States, to wit, section 37 of the Criminal Code of the United States of America (U. S. C., Title 18, section 88), commonly known as the "conspiracy statute," a federal warrant for the apprehension and arrest of one HV, alias HA, alias KJ, which said federal warrant was so issued on an indictment returned on, to wit, _____, 19—, by a grand jury for the United States of America,

impaneled and sworn in the said District Court for said District of —, and pending in said district against the said HV, alias HA, alias KJ, and other persons, which said indictment charged a violation of section 37 of the Criminal Code of the United States of America (U. S. C., Title 18, section 88).

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said HV, alias HA, alias KJ, became, at the time of and by reason of the issuance of said warrant as aforesaid, and was in fact a fugitive from federal justice and remained such fugitive continuously from, to wit, — —, 19—, until, to wit, — —, 19—, at which latter time the said HV, alias HA, alias KJ, was shot and killed, and that the said HV, alias HA, alias KJ, was continuously from, to wit, — —, 19—, until, to wit, — —, 19—, evading arrest and apprehension on said warrant so issued as aforesaid, and was avoiding discovery and service of said warrant upon his person.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that WL, alias RR, HC, and AO, none of which persons are herein named as defendants, but all of which said persons are hereinafter referred to as coconspirators, and one LP, hereinafter referred to as defendant, each late of the city of — aforesaid, in the — Division of the — District of —, as aforesaid, and one JP and one JD, both lately deceased and hereinafter referred to as decedents, continuously from — —, 19—, or thereabouts, to — —, 19—, or thereabouts, in the city of —, in the — Division of the — District of — aforesaid, each well knowing the premises aforesaid, unlawfully, wilfully, knowingly, and feloniously did conspire, combine, confederate, and agree together, and with each other, to commit an offense against the United States of America, in this, that they unlawfully, wilfully, knowingly, and feloniously did conspire to violate section 141 of the Criminal Code of the United States of America (U. S. C., Title 18, section 246) that is to say, that the said defendant, the said coconspirators, and the said decedents, at the city of — aforesaid, in the division and district of — aforesaid, having notice and with knowledge of the fact that a federal warrant had been issued as aforesaid for the arrest and apprehension of the said HV, alias HA, alias KJ, and having notice and with knowledge of the fact that as aforesaid the said HV, alias HA, alias KJ, was in fact a fugitive from federal justice and was evading arrest and apprehension on the said warrant so issued as aforesaid, and was avoiding discovery and service of said warrant on his person as aforesaid, did, for the purpose of preventing the discovery of the said HV, alias HA, alias KJ, and for the purpose of preventing his arrest on the said warrant so issued as aforesaid, unlawfully, wilfully, knowingly, and feloniously, conspire, combine, confederate, and agree together to harbor and conceal the said HV, alias HA, alias KJ, at those certain premises known and described as Number — — Avenue in the city of — aforesaid, in the division and district of — aforesaid.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that it was part of said unlawful conspiracy to harbor and conceal the said HV, alias HA, alias KJ, that the said coconspirators, the said decedents, and the said defendant, LP, should obtain and render to the said HV, alias HA, alias KJ, at the premises above described, such protection, sustenance, and services, including medical and surgical treatment and attention, and such other assistance as might be required in furtherance of said unlawful conspiracy, and should obtain for said HV, alias HA, alias KJ, such surgical operations on and alterations of his face, fingertips, and other parts of his body as might prevent the discovery and arrest of the said HV, alias HA, alias KJ, under said warrant issued and outstanding as aforesaid.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said defendant, the said coconspirators, and the said decedents, in furtherance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, did and performed the following overt acts:

OVERT ACTS

1. That on or about — —, 19—, the said defendant, LP, and the said coconspirators, and the said decedent, JD, did unlawfully arrange with the said decedent, JP, for the use and occupancy of those certain premises known and described as Number — — Avenue, in the city of —, in the division and district of — aforesaid, in which to conceal and harbor the said HV, alias HA, alias KJ.

2. That on, to wit, — —, 19—, said defendant, LP, in the city of — aforesaid, requested the said coconspirator, HC, to go to said premises at Number — — Avenue, in the city of —, in the division and district of — aforesaid, for the purpose of affording medical services and attention to the said HV, alias HA, alias KJ, so as to assist in preventing his discovery and arrest.

3. That on, to wit, — —, 19—, the defendant, LP, went to the place of abode of said coconspirator, WL, alias RR, at — — Avenue, in the city of —, in the district and division of —, aforesaid, and did then and there arrange with said coconspirator that the said coconspirator should go to said Number — — Avenue on the evening of — —, 19— for the purpose of performing certain surgical operations on said HV, alias HA, alias KJ, that would aid in preventing discovery and arrest of the said HV, alias HA, alias KJ.

4. That on, to wit, — —, 19—, the said coconspirators, WL, alias RR, and HC did go, as requested by said defendant, LP, to the premises known and described as Number — — Avenue, in the city of — aforesaid, and did then and there perform certain surgical operations upon the said coconspirator, AO, and the said decedent, JD, were then and there present.

5. That on, to wit, — —, 19—, the said defendant, LP, and the said coconspirator, AO went to those premises known and described as Number — — Avenue in the city of — aforesaid, and said defendant, LP, did then and there receive from the said HV, alias HA, alias KJ, the sum of, to wit: — dollars (\$—), in the presence of the said coconspirators, WL, alias RR, HC, and AO, and the said decedents, JD and JP.

6. That on, to wit, — —, 19—, said defendant, LP, at said — Avenue, in the city of — aforesaid, requested said coconspirator, WL, alias RR, to go again to said premises at Number — Avenue, in the city of — aforesaid, on, to wit, — —, 19—, for the purpose of rendering to said HV, alias HA, alias KJ, further surgical and medical services and attention.

7. That on, to wit, said — —, 19—, said coconspirators, WL, alias RR, did return as requested by said defendant, LP, to said premises at Number — Avenue, in the city of — aforesaid, and did then and there render further surgical and medical services and attention to the said HV, alias HA, alias KJ, so as to assist in preventing his discovery and arrest.

8. That from, to wit, — —, 19—, to, to wit, — —, 19—, the said defendant, LP, the said coconspirators, AO, WL, alias RR, and HC, together with the said decedents, JP and JD, unlawfully and clandestinely did furnish and afford shelter, sustenance, protection, and services to the said HV, alias HA, alias KJ, at those certain premises known and described as Number — Avenue, in the city of — aforesaid, in the division and district of — aforesaid, so as to prevent the discovery and arrest of said HV, alias HA, alias KJ, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

United States attorney.

Source of Form.

From the record in *Piquett v. United States* (C. C. A. 7), 81 Fed. (2d) 75. Cert. den. 298 U. S. 664, 80 L. ed. 1388, 56 Sup. Ct. 749.

Statutory References.

Attacking indictment because of unqualified grand jurors, 7 F. C. A., Title 18, § 554a; U. S. C. A., Title 18, § 554a; id. U. S. C.

Conspiracy, 7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88; id. U. S. C.

Conspiracy to cast away vessel, 7 F. C. A., Title 18, § 487; U. S. C. A., Title 18, § 487; id. U. S. C.

Conspiracy to injure persons in exercise of civil rights, 7 F. C. A., Title 18, § 51; U. S. C. A., Title 18, § 51; id. U. S. C.

Conspiracy to intimidate party, witness, or juror, 7 F. C. A., Title 18, § 242; U. S. C. A., Title 18, § 242; id. U. S. C.

Conspiracy to kidnap, 7 F. C. A., Title 18, §§ 408a to 408c-1; U. S. C. A., Title 18, §§ 408a to 408c-1; id. U. S. C.

Conspiracy to prevent officer from performing duties, 7 F. C. A., Title 18, § 54; U. S. C. A., Title 18, § 54; id. U. S. C.

Conspiracy to transport kidnaped persons in interstate commerce, 7 F. C. A., Title 18, § 408c; U. S. C. A., Title 18, § 408c; id. U. S. C.

Criminal law and procedure in general, 7 F. C. A., Title 18, § 575; U. S. C. A., Title 18, § 575; id. U. S. C.

Form and sufficiency of indictments for perjury, 7 F. C. A., Title 18, § 558; U. S. C. A., Title 18, § 558; id. U. S. C.

Indictment not insufficient for defect in form unless defendant actually prejudiced, nor by reason of attendance of clerical assistants before the grand jury, 7 F. C. A., Title 18, § 556; U. S. C. A., Title 18, § 556; id. U. S. C.

Joinder of charges, 7 F. C. A., Title 18, § 557; U. S. C. A., Title 18, § 557; id. U. S. C.

Seditious conspiracy, 7 F. C. A., Title 18, § 6; U. S. C. A., Title 18, § 6; id. U. S. C.

Time for making objections to qualifications or irregularities concerning grand jurors, 7 F. C. A., Title 18, § 556a; U. S. C. A., Title 18, § 556a; id. U. S. C.

NOTES TO DECISIONS

In General.

In an indictment for criminal conspiracy, the conspiracy must be sufficiently charged, and can not be aided by the averments of acts done by one or more of the conspirators. *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. 531.

An indictment for conspiracy to effect an illegal or criminal purpose must show clearly the purpose; for conspiracy to effect a lawful purpose by criminal means, it must clearly show the means. *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. 542.

The word "feloniously" need not be put in the indictment. *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. 467.

The indictment must state sufficiently the offense intended to be committed, and must then state some act done by one of the conspirators towards effecting the object of the conspiracy. *United States v. Watson* (D. C.-Miss.), 17 Fed. 145.

Under R. S., § 5440 (7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88; id. U. S. C.), three essentials must be charged: (1) A conspiracy; (2) a design either to commit an offense against the United States or to defraud the United States; (3) an overt act. *United States v. Adler* (D. C.-Iowa), 49 Fed. 736.

An indictment which avers the conspiracy and then sets out the overt acts done to carry it into effect is sufficient. *United States v. Benson* (C. C. A. 9), 70 Fed. 591.

In alleging conspiracy, the words "unlawfully did conspire" are sufficient when followed by the object of the conspiracy and the overt acts, and it is not necessary to use other verbs, nor otherwise to show that the defendants conspired together or with each other. *Wright v. United States* (C. C. A. 5), 108 Fed. 805. Cert. den. 181 U. S. 620, 45 L. ed. 1031, 21 Sup. Ct. 924.

Defects of form do not ordinarily vitiate an indictment. *Wright v. United States* (C. C. A. 5), 108 Fed. 805. Cert. den. 181 U. S. 620, 45 L. ed. 1031, 21 Sup. Ct. 924; *United States v. Greene* (D. C.-Ga.), 115 Fed. 343; *Jones v. United States* (C. C. A. 9), 162 Fed. 417. Cert. den. 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. 685; *Tapack v. United States* (C. C. A. 3), 220 Fed. 445. Cert. den. 238 U. S. 627, 59 L. ed. 1495, 35 Sup. Ct. 664.

The agreement may be laid in the words of the statute. *United States v. White* (C. C.-N. Y.), 171 Fed. 775.

Indictment in general terms and lacking in particulars was sufficient where seasonable objection was not made. *Smith v. United States* (C. C. A. 9), 231 Fed. 25. Cert. den. 242 U. S. 636, 61 L. ed. 439, 37 Sup. Ct. 19.

An indictment which sets forth the names of the alleged conspirators, charged with conspiracy to commit an offense against the United States, the nature of the offense, with the overt act committed in and for the purpose of executing them, is sufficient. *United States v. Pennsylvania Cent. Coal Co.* (D. C.-Pa.), 256 Fed. 703.

Indictment need not use word "knowingly." *Waldeck v. United States* (C. C. A. 7), 2 Fed. (2d) 243. Cert. den. 267 U. S. 595, 69 L. ed. 805, 45 Sup. Ct. 232.

An indictment for conspiracy to commit an offense need not describe the offense which is the object of the conspiracy with the same certainty as would be required in an indictment for that offense. *Taylor v. United States* (C. C. A. 7), 2 Fed. (2d) 444. Cert. den. 266 U. S. 634, 69 L. ed. 479, 45 Sup. Ct. 226; *Belvin v. United States* (C. C. A. 4), 12 Fed. (2d) 548; *Middleton v. United States* (C. C. A. 8), 49 Fed. (2d) 538.

An indictment which charged that a first-named group conspired with a second-named group was held to mean that the persons in one group conspired with

those in the other group and that all conspired to commit the forbidden offenses. *A. Guckenheimer & Bros. Co. v. United States* (C. C. A. 3), 3 Fed. (2d) 786. Cert. den. 268 U. S. 688, 69 L. ed. 1157, 45 Sup. Ct. 509.

An indictment in its allegations as to intended means may be as general and indefinite as the conspiracy which it seeks to punish. *Bailey v. United States* (C. C. A. 5), 5 Fed. (2d) 437. Cert. dism. 269 U. S. 589, 70 L. ed. 427, 46 Sup. Ct. 12.

An indictment charging that the defendants did combine, confederate, and agree together and with divers other persons whose names are to the grand jurors unknown, sufficiently described the parties to the conspiracy. *Rubio v. United States* (C. C. A. 9), 22 Fed. (2d) 766. Cert. den. 276 U. S. 619, 72 L. ed. 734, 48 Sup. Ct. 213.

If the indictment as a whole sufficiently alleges ultimate facts which disclose a conspiracy, it is sufficient. *Blaine v. United States* (C. C. A. 5), 29 Fed. (2d) 651. Cert. den. 279 U. S. 845, 73 L. ed. 990, 49 Sup. Ct. 342.

It is competent to charge a single conspiracy to violate both the tariff and prohibition acts, and proof as to either will support conviction. *Hogan v. United States* (C. C. A. 5), 48 Fed. (2d) 516. Cert. den. 284 U. S. 668, 76 L. ed. 565, 52 Sup. Ct. 42.

The substantive crime need not be described with particularity, the means by which the object of the conspiracy is to be obtained need not be set out in detail, and averment of time and place of overt act is a sufficient allegation of time and place of the formation of the conspiracy. *Enrique Rivera v. United States* (C. C. A. 1), 57 Fed. (2d) 816.

The essentials of a conspiracy are those that existed at common law and they must be alleged in the indictment. *Asgill v. United States* (C. C. A. 4), 60 Fed. (2d) 780.

Word "victims" should not have been used to refer to persons alleged to have been defrauded, though it was held not prejudicial. *Stern v. United States* (C. C. A. 7), 85 Fed. (2d) 394. Cert. den. 299 U. S. 576, 81 L. ed. 424, 57 Sup. Ct. 40.

Counts charging conspiracy to influence a juror and to impede justice was good as against contention it charged a conspiracy to bribe which would not

lie. *Slade v. United States* (C. C. A. 10), 85 Fed. (2d) 786.

Army Insubordination.

Indictment to cause insubordination in the army by means of pamphlet to be circulated among members was good. *United States v. Nearing* (D. C.-N. Y.), 252 Fed. 223.

Averments of Object and Means.

When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be stated clearly in the indictment, while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, the means must be set out. *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. 542.

In stating the object of the conspiracy, the same degree of detail is not required as in charging the substantive offense. *Thornton v. United States*, 271 U. S. 414, 70 L. ed. 1013, 46 Sup. Ct. 585, affg. (C. C. A. 5), 2 Fed. (2d) 561; *Wong Tai v. United States*, 273 U. S. 77, 71 L. ed. 545, 47 Sup. Ct. 300; *United States v. D'Arcy* (D. C.-R. I.), 243 Fed. 739; *United States v. Rosenwasser* (D. C.-N. Y.), 255 Fed. 233; *United States v. Downey* (D. C.-R. I.), 257 Fed. 364; *United States v. Jones* (D. C.-Ill.), 298 Fed. 131; *Ford v. United States* (C. C. A. 9), 10 Fed. (2d) 339. Affd. 273 U. S. 593, 71 L. ed. 793, 47 Sup. Ct. 531; *Hartson v. United States* (C. C. A. 2), 14 Fed. (2d) 561; *Green v. United States* (C. C. A. 8), 28 Fed. (2d) 965; *Enrique Rivera v. United States* (C. C. A. 1), 57 Fed. (2d) 816; *Coates v. United States* (C. C. A. 9), 59 Fed. (2d) 173; *Breyton v. United States* (C. C. A. 10), 74 Fed. (2d) 389; *Craig v. United States* (C. C. A. 9), 81 Fed. (2d) 816. Cert. den. 298 U. S. 690, 80 L. ed. 1408, 56 Sup. Ct. 959. Reh. den. 299 U. S. 620, 81 L. ed. 457, 57 Sup. Ct. 6. See also *Hyde v. United States*, 27 App. D. C. 362.

The offense which is intended to be required in an indictment in which need not be described as fully as would committed as the result of the conspiracy such matter was charged as a substantive crime. *Ching v. United States* (C. C. A. 4), 118 Fed. 538; *Rulovitch v. United States* (C. C. A. 3), 286 Fed. 315. Cert. den. 261 U. S. 622, 67 L. ed. 831,

43 Sup. Ct. 434; *Olmstead v. United States* (C. C. A. 9), 19 Fed. (2d) 842, 53 A. L. R. 1472. Cert. den. 275 U. S. 557, 72 L. ed. 424, 48 Sup. Ct. 117; *Harper v. United States* (C. C. A. 8), 27 Fed. (2d) 77; *Pollock v. United States* (C. C. A. 4), 34 Fed. (2d) 94. Cert. den. 280 U. S. 600, 74 L. ed. 645, 50 Sup. Ct. 81; *Scaffidi v. United States* (C. C. A. 1), 37 Fed. (2d) 203; *Perry v. United States* (C. C. A. 5), 39 Fed. (2d) 52. Cert. den. 281 U. S. 769, 74 L. ed. 1176, 50 Sup. Ct. 467; *Middleton v. United States* (C. C. A. 8), 49 Fed. (2d) 538; *Coates v. United States* (C. C. A. 9), 59 Fed. (2d) 173; *Craig v. United States* (C. C. A. 9), 81 Fed. (2d) 816. Reh. den. 83 Fed. (2d) 450. Cert. dismd. as premature, 298 U. S. 637, 80 L. ed. 1371, 56 Sup. Ct. 670. Cert. den. 298 U. S. 690, 80 L. ed. 1408, 56 Sup. Ct. 959. Reh. den. 299 U. S. 620, 81 L. ed. 457, 57 Sup. Ct. 6; *Center v. United States* (C. C. A. 4), 96 Fed. (2d) 127; *United States v. Dustin* (C. C.-Ohio), Fed. Cas. No. 15011, 2 Bond 332.

Where the substantive offense includes the elements of knowledge and will, the indictment for conspiracy to commit such offense must charge that the defendants conspired to "knowingly and wilfully" do the unlawful acts. *Conrad v. United States* (C. C. A. 5), 127 Fed. 798; *United States v. Comstock* (C. C.-R. I.), 162 Fed. 415.

Misstatement in indictment of section number of Criminal Code defining substantive offense was immaterial, where the facts descriptive of the offense were set forth. *Ex parte King* (D. C.-Ga.), 200 Fed. 622; *Biskind v. United States* (C. C. A. 6), 281 Fed. 47, 28 A. L. R. 1377. Cert. den. 260 U. S. 731, 67 L. ed. 486, 43 Sup. Ct. 93; *Harper v. United States* (C. C. A. 8), 27 Fed. (2d) 77.

Indictment need not describe in detail the means by which the object of the conspiracy is to be attained. *Houston v. United States* (C. C. A. 9), 217 Fed. 852. Cert. den. 238 U. S. 613, 59 L. ed. 1490, 35 Sup. Ct. 284.

Though the allegations of overt acts may not be used to enlarge the scope of the conspiracy, yet they practically meet many of the objections to the generality of the charge of conspiracy. They inform the defendants in much detail of the particular matters upon which proof will be offered, and thus give specifications of the completed acts done in pursuance of the conspiracy and during its

continuance. *United States v. Downey* (D. C.-R. I.), 257 Fed. 364.

In conspiracy to commit offense, the offense need only be described sufficiently to identify it. *Zucker v. United States* (C. C. A. 3), 288 Fed. 12. Cert. den. 262 U. S. 750, 67 L. ed. 1214, 43 Sup. Ct. 525, and 262 U. S. 756, 67 L. ed. 1218, 43 Sup. Ct. 703.

The means by which an unlawful act is to be accomplished need not be set forth in the indictment. *United States v. Weiss* (D. C.-Ill.), 293 Fed. 992. See also *Proffitt v. United States* (C. C. A. 9), 264 Fed. 299; *United States v. Drawdy* (D. C.-Fla.), 288 Fed. 567; *United States v. Dennee* (C. C.-La.), Fed. Cas. No. 14948, 3 Woods 47.

All means agreed upon to carry conspiracy forward need not be alleged. The object of conspiracy, being substantive crime, need not be charged particularly. *United States v. Olmstead* (D. C.-Wash.), 5 Fed. (2d) 712.

The crime which is the object of an unlawful conspiracy requires no more elaborate statement than is necessary for the allegation of the crime when charged as a substantive offense. *United States v. Dwyer* (D. C.-N. Y.), 13 Fed. (2d) 427.

Indictment need not describe the offense constituting the subject of the conspiracy with great particularity but must identify it, and show that none of its elements were lacking. *United States v. Eisenminger* (D. C.-Del.), 16 Fed. (2d) 816.

Indictment must state essential elements of offense to be committed. *Bartkus v. United States* (C. C. A. 7), 21 Fed. (2d) 425; *Brown v. United States* (C. C. A. 5), 21 Fed. (2d) 827.

Allegations as to purpose of conspiracy need only show that the conspiracy was of a criminal character, and to describe it with sufficient certainty to prevent a second prosecution. *Freedman v. United States* (C. C. A. 1), 64 Fed. (2d) 661. Cert. den. 290 U. S. 642, 78 L. ed. 557, 54 Sup. Ct. 60.

Where the objects of a conspiracy are separate, it is not a good objection that the indictment charges more than was or could be proved if what it well alleged constitutes an offense. *Morrison v. United States* (C. C. A. 5), 71 Fed. (2d) 358. Cert. den. 293 U. S. 589, 79 L. ed. 684, 55 Sup. Ct. 104.

Indictment substantially in the form of the statute and charging specific overt

acts is sufficient. *Pullin v. United States* (C. C. A. 5), 104 Fed. (2d) 57.

While indictment need not allege with particularity the offense which is the subject of the conspiracy, it must appear that the act, if accomplished, would have been an offense. *United States v. Golder* (D. C.-Pa.), 11 Fed. Supp. 870.

Averments of Time and Place.

The exact place of the formation of the conspiracy need not be stated where the venue is laid at the place where an overt act was committed. *Brown v. Elliott*, 225 U. S. 392, 56 L. ed. 1136, 32 Sup. Ct. 812.

The time and place of the overt act should be alleged to identify the act, and show that it was after the conspiracy, and was not a part of the conspiracy, but an act done to effect its object. *United States v. Milner* (C. C.-Ala.), 36 Fed. 890.

Time and place of commission of the offense must be alleged, but it may be proved to have been committed on any day previous to the finding of the indictment during the statutory period. *United States v. Francis* (D. C.-Pa.), 144 Fed. 520. Mod. 152 Fed. 155. Cert. den. 206 U. S. 565, 51 L. ed. 1191, 27 Sup. Ct. 797.

Allegation of date of offense is ordinarily formal inasmuch as any other date before the finding of the indictment and within the statute of limitations may be proved unless a particular day is made material by statute. *Harrington v. United States* (C. C. A. 8), 267 Fed. 97.

Indictment need not allege the exact time or place of the conspiracy or overt acts, where facts alleged show an offense not barred by the statute of limitations and within the jurisdiction of the court. *Baker v. United States* (C. C. A. 5), 285 Fed. 15. Cert. den. 260 U. S. 749, 67 L. ed. 494, 43 Sup. Ct. 248.

Indictment alleging conspiracy and an overt act committed "afterwards" shows that conspiracy preceded overt act. *Goukler v. United States* (C. C. A. 3), 294 Fed. 274.

Averment that overt acts were committed in pursuance of and to effect the object of the conspiracy sufficiently shows that the conspiracy preceded the overt acts. *Goldberg v. United States* (C. C. A. 5), 297 Fed. 98.

Time of conspiracy is made definite in indictment by reference in the charge of conspiracy to the time set out in the charge of the overt acts. *Woitte v.*

United States (C. C. A. 9), 19 Fed. (2d) 506. Cert. den. 275 U. S. 545, 72 L. ed. 417, 48 Sup. Ct. 84.

Averment of time and place of overt acts is a sufficient allegation of time and place of formation of the conspiracy. *Enrique Rivera v. United States* (C. C. A. 1), 57 Fed. (2d) 816.

An indictment which follows the usual form as defined by 7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88, id. U. S. C., and includes specific allegations as to persons, time, place, and events, is sufficient. *Wainer v. United States* (C. C. A. 7), 87 Fed. (2d) 77.

Indictment correctly alleging venue was not insufficient for failure to allege the precise place of the crime, the defendant could have asked for a bill of particulars. *Touhy v. United States* (C. C. A. 8), 88 Fed. (2d) 930.

It is sufficient to state that the conspiracy was entered into within the territorial limits of the District Court in which the prosecution is brought. *United States v. National Title Guaranty Co.* (D. C.-N. Y.), 12 Fed. Supp. 473.

Approximate date of conspiracy should be alleged. *United States v. National Title Guaranty Co.* (D. C.-N. Y.), 12 Fed. Supp. 473.

An indictment for conspiracy must allege the time and place of conspiracy. *United States v. Soper* (C. C.-D. C.), Fed. Cas. No. 16353, 4 Cranch C. C. 623.

Bankruptcy, Concealing Assets.

An indictment for concealing assets of a bankrupt must charge the intended offense as "knowingly and fraudulently" committed, or equivalent words. *United States v. Comstock* (C. C.-R. I.), 162 Fed. 415.

It is sufficient to allege a conspiracy to conceal the goods before bankruptcy, if it is shown that the conspiracy and the concealment were to continue after the trustee should be appointed. *Alkon v. United States* (C. C. A. 1), 163 Fed. 810; *United States v. Young & Holland Co.* (C. C.-R. I.), 170 Fed. 110. Mod. 195 Fed. 353. Cert. den. 225 U. S. 710, 56 L. ed. 1267, 32 Sup. Ct. 840; *Roukous v. United States* (C. C. A. 1), 195 Fed. 353. Cert. den. 225 U. S. 710, 56 L. ed. 1267, 32 Sup. Ct. 840; *Friedman v. United States* (C. C. A. 7), 236 Fed. 816.

An indictment for conspiracy to violate the bankruptcy act by the bankrupt concealing his property from the trustee, must, if the conspiracy is charged to

have been formed before the bankruptcy, show that the parties contemplated bankruptcy; or, if the conspiracy is charged to have been formed after the bankruptcy, there must be alleged an overt act after the bankruptcy; mere failure to act is not an overt act. *United States v. Grodson* (D. C.-Ill.), 164 Fed. 157.

An indictment for conspiring to conceal assets from the trustee in bankruptcy which names the trustee and alleges he was duly appointed, is sufficient and need not allege manner in which appointment was made. *Kerch v. United States* (C. C. A. 1), 171 Fed. 366. Cert. den. 215 U. S. 602, 54 L. ed. 344, 30 Sup. Ct. 402.

Indictment need not aver the appointment of a trustee. *Radin v. United States* (C. C. A. 2), 189 Fed. 568. Cert. den. 220 U. S. 623, 55 L. ed. 614, 31 Sup. Ct. 724; *Steigman v. United States* (C. C. A. 3), 220 Fed. 63.

Indictment need not use the words "knowingly and fraudulently" if their equivalents are used. *Tapack v. United States* (C. C. A. 3), 220 Fed. 445. Cert. den. 238 U. S. 627, 59 L. ed. 1495, 35 Sup. Ct. 664.

An indictment charging a conspiracy to commit four separate offenses relating to bankruptcy charges a single crime. *Knoell v. United States* (C. C. A. 3), 239 Fed. 16.

Allegations that the property which defendants conspired to conceal "belonged to the estate in bankruptcy" and also "owned and possessed by said bankrupt" are not inconsistent since they refer to periods before and after bankruptcy. *United States v. Baker* (D. C.-R. I.), 243 Fed. 741.

Indictment against persons other than bankrupt for conspiracy with bankrupt to conceal assets was sufficient. *Jollit v. United States* (C. C. A. 5), 285 Fed. 209. Cert. den. 261 U. S. 624, 67 L. ed. 832, 43 Sup. Ct. 519; *Shaffman v. United States* (C. C. A. 3), 289 Fed. 370.

Averment of adjudication and appointment of trustee was not necessary. *Jollit v. United States* (C. C. A. 5), 285 Fed. 209. Cert. den. 261 U. S. 624, 67 L. ed. 832, 43 Sup. Ct. 519; *Bartkus v. United States* (C. C. A. 7), 21 Fed. (2d) 425.

Indictment is not rendered bad by allegation that the property to be concealed belonged to the bankrupts. *Pasz-kiewicz v. United States* (C. C. A. 7), 3 Fed. (2d) 272.

Indictment should allege affirmatively that bankrupt company was party to conspiracy. *Simon v. Keville* (D. C.-Mass.), 4 Fed. (2d) 575. Affd. 7 Fed. (2d) 1021.

Where one overt act would be effective in furtherance of the conspiracy other may be disregarded for purpose of considering demurrer. *Kolbrenner v. United States* (C. C. A. 5), 11 Fed. (2d) 754.

Count charging bankrupts with concealment and others with aiding act, and second count charging all defendants with conspiracy, was not duplicitous and not a double charge of conspiracy. *Marcus v. United States* (C. C. A. 3), 20 Fed. (2d) 454. Cert. den. 275 U. S. 565, 72 L. ed. 429, 48 Sup. Ct. 122.

Indictment for conspiracy by trustee and others to embezzle property need not allege ownership by bankrupt estate, and description of property was sufficient. *Meagher v. United States* (C. C. A. 9), 36 Fed. (2d) 156.

Indictment merely following language of the statute and not alleging facts was insufficient. *United States v. Fuselier* (D. C.-La.), 46 Fed. (2d) 568.

Indictment charging that the president and other codefendants dominated and controlled the corporation and they together with the corporation conspired that said corporation should conceal from the trustee in bankruptcy, property which would belong to the estate in bankruptcy, was sufficient to charge corporation's president and codefendants with conspiracy to conceal the company's assets, rather than corporation. *Somberg v. United States* (C. C. A. 7), 71 Fed. (2d) 637.

Indictment charging conspiracy to conceal assets of bankrupt corporation was sufficient without specifying the overt act, but if defendant was unable to prepare for trial without further specifications, his remedy was a motion for a bill of particulars. *Brayton v. United States* (C. C. A. 10), 74 Fed. (2d) 389.

Bribery of United States Officer.

An indictment may charge a conspiracy between one not an officer and a government officer to commit a crime which the officer alone could commit. *Downs v. United States* (C. C. A. 3), 3 Fed. (2d) 855. Cert. den. 268 U. S. 689, 69 L. ed. 1158, 45 Sup. Ct. 509; *Ex parte O'Leary* (C. C. A. 7), 56 Fed. (2d) 515.

Description of officer who was sought to be bribed as a "Federal Narcotic Agent" was sufficient. *Hone Wu v. United States* (C. C. A. 7), 60 Fed. (2d) 189.

Census Law Returns.

Indictment which was held sufficient is set out in *United States v. Stevens* (D. C.-Minn.), 44 Fed. 132.

Chinese Exclusion Acts.

An indictment under R. S., § 5440 (7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88; id. U. S. C.) for conspiracy to aid and abet the landing of Chinese in the United States in violation of § 11 of the Act of July 5, 1884, by furnishing them false evidence of identification and advising them how to answer probable questions, was sufficient. *United States v. Wilson* (D. C.-Ore.), 69 Fed. 890.

Overt acts that defendants purchased at Boston provisions for the provisioning of vessel on outward voyage; that they sailed the vessel from Boston to Mexico for purpose of accomplishing a return voyage; that a certain telegram was sent containing instructions for the return voyage were sufficient for the indictment. *Daly v. United States* (C. C. A. 1), 170 Fed. 321.

Indictment was sufficient where it did not name the Chinese aliens, or allege their names were unknown, but merely referred to them as "certain Chinese alien persons." *Dahl v. United States* (C. C. A. 9), 234 Fed. 618, affg. 225 Fed. 909.

Indictment need not allege that the Chinamen intended to be imported did not belong to a class excepted by law. *Wing v. United States* (C. C. A. 5), 280 Fed. 112.

Civil Rights, Deprivation or Interference.

An indictment under the Enforcement Act of 1870 (7 F. C. A., Title 18, § 51; U. S. C. A., Title 18, § 51; id. U. S. C.) must show that the conspiracy was to prevent the exercise of a right under the federal laws or Constitution and must set out particularly what federal right was to be hindered. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

An indictment charging conspiracy to intimidate a citizen of African descent in his right to vote for a member of Congress was good. *Ex parte Yarbrough*,

110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. 152.

Indictment for conspiracy to prevent exercise of rights of homestead entry was sufficient. *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. 35.

Indictment, in federal court, for conspiracy to deprive negro citizen, indicted for murder, of right of trial by jury, was demurrable for want of jurisdiction in the federal court. *United States v. Powell*, 212 U. S. 564, 53 L. ed. 653, 29 Sup. Ct. 690.

The indictment must allege that the persons conspired against were citizens. *United States v. Patrick* (C. C.-Tenn.), 53 Fed. 356.

Indictment based on conspiracy against exercise by revenue officers of their official right to search for and seize concealed, illegal liquors was good. *United States v. Patrick* (C. C.-Tenn.), 54 Fed. 338.

An indictment charging a conspiracy to deprive a United States marshal of his right to arrest defendant on criminal process, resulting in murder of the marshal, is not a charge of both conspiracy and murder, but is a good indictment for conspiracy. *United States v. Davis* (C. C.-Tenn.), 103 Fed. 457; *Davis v. United States* (C. C. A. 6), 107 Fed. 753.

An indictment charging that defendants "did conspire," meant that they agreed together or among themselves. *Wright v. United States* (C. C. A. 5), 108 Fed. 805. Cert. den. 181 U. S. 620, 45 L. ed. 1031, 21 Sup. Ct. 924.

The indictment must state the particular right that was intended to be affected by the conspirators. *McKenna v. United States* (C. C. A. 6), 127 Fed. 88; *United States v. Eberhart* (C. C.-Ga.), 127 Fed. 254.

Indictment for conspiracy to deprive citizens of right to vote at congressional election was good. *United States v. Stone* (D. C.-Md.), 188 Fed. 836.

The unlawful purpose need not be set out with the same particularity as would be necessary if it were a prosecution for the unlawful acts when committed. *Aczel v. United States* (C. C. A. 7), 232 Fed. 652.

An accusation of a criminal purpose must be stated positively; the indictment can not be aided by any facts not appearing upon the face of the indictment, nor

can the overt acts be resorted to to aid the allegation of conspiracy. *United States v. Wilcox* (D. C.-R. I.), 243 Fed. 993.

An allegation "you had better watch out; we have got something on you," was too vague. *United States v. Welch* (D. C.-R. I.), 243 Fed. 996.

Indictment charging conspiracy to injure and oppress candidates and legal voters in general in the exercise and enjoyment of their right to have all legally cast votes and none other counted and returned at an election was insufficient to charge an offense under 7 F. C. A., Title 18, § 51; U. S. C. A., Title 18, § 51; *id.* U. S. C. Chavez v. *United States* (C. C. A. 8), 261 Fed. 174.

An indictment alleging that election inspectors conspired to record votes falsely for the purpose of injuring the voters charges an offense notwithstanding there was no allegation naming the voters intended to be injured. *United States v. Pleva* (C. C. A. 2), 66 Fed. (2d) 529.

Indictment charging conspiracy to violate 7 F. C. A., Title 18, § 51; U. S. C. A., Title 18, § 51; *id.* U. S. C. by interfering with citizen's right to give information of crime to government officers was sufficient. *Nicholson v. United States* (C. C. A. 8), 79 Fed. (2d) 387.

An indictment charging that defendants conspired to count, record, and certify the ballots of voters falsely with fraudulent intent, charges an injury to individuals whose ballots were denied their intended effect as well as to the public. *Walker v. United States* (C. C. A. 8), 93 Fed. (2d) 383. Cert. den. 303 U. S. 644, 82 L. ed. 1103, 58 Sup. Ct. 642. Reh. den. 303 U. S. 668, 82 L. ed. 1124, 58 Sup. Ct. 755.

An indictment charging a conspiracy to injure and oppress citizens in their right to vote for presidential electors and to have their votes counted as cast does not charge a federal offense. *Walker v. United States* (C. C. A. 8), 93 Fed. (2d) 383. Cert. den. 303 U. S. 644, 82 L. ed. 1103, 58 Sup. Ct. 642. Reh. den. 303 U. S. 668, 82 L. ed. 1124, 58 Sup. Ct. 755.

Contention that indictment charging the counting of ballots for the wrong candidate was insufficient because it failed to charge ballot was not counted for right candidate was without merit. *United States v. Buck* (D. C.-Mo.), 18

Fed. Supp. 213. Affd. 93 Fed. (2d) 395. Cert. den. 303 U. S. 644, 82 L. ed. 1103, 58 Sup. Ct. 642. Reh. den. 303 U. S. 668, 82 L. ed. 1124, 58 Sup. Ct. 756.

It was not necessary that the indictment set out in extenso all of the ballots cast in the precinct. *United States v. Buck* (D. C.-Mo.), 18 Fed. Supp. 213. Affd. 93 Fed. (2d) 395. Cert. den. 303 U. S. 644, 82 L. ed. 1103, 58 Sup. Ct. 642. Reh. den. 303 U. S. 668, 82 L. ed. 1124, 58 Sup. Ct. 756.

The violation of 7 F. C. A., Title 18, § 51; U. S. C. A., Title 18, § 51; *id.* U. S. C. constitutes an infamous crime, and must be presented by indictment, rather than information. *United States v. Butler* (C. C.-S. Car.), Fed. Cas. No. 14701, 4 Hughes 512.

Where an indictment alleges more than one purpose of the conspiracy, only one of such purposes need be proved in order to convict. *United States v. Mitchell* (C. C.-S. Car.), Fed. Cas. No. 15790, 1 Hughes 439.

Civil Service Laws.

Indictment for false personation in civil service examination for post-office clerkship was good. *United States v. Bunting* (D. C.-Pa.), 82 Fed. 883.

Corrupt Administration of Law.

It is not essential that the corrupt motive and guilty knowledge be made to appear at every turn of what is alleged, touching the means to be employed to effectuate the unlawful purpose, in an indictment for corruptly administering an Act of Congress. *United States v. Moore* (C. C.-Ore.), 173 Fed. 122.

Custom Duties—Revenue Laws—Income Taxes.

Indictment for conspiracy to defeat a certain system of collections of customs existing at a certain port and thereby escape payment of lawful customs duties was not bad because the system of collections was not in accordance with the statutes. *United States v. Rosenthal* (C. C.-N. Y.), 126 Fed. 766. Affd. 145 Fed. 1.

Indictment of customs officer and importers for conspiracy to defraud United States of customs duties by means of false invoices made abroad was good. *Browne v. United States* (C. C. A. 2), 145 Fed. 1.

It is sufficient to show in the indictment that the conspiracy was to do an

act which would constitute a fraud upon the United States. *United States v. Stamatoopoulos* (C. C.-N. Y.), 164 Fed. 524.

Indictment for conspiracy to defraud the United States by removing distilled spirits on which the revenue taxes had not been paid is not bad on account of showing that the substantive offense was committed. *Scott v. United States* (C. C. A. 5), 165 Fed. 172.

An indictment that charged the defendants conspired to effect an entry of sugars at less than their weights, and that the means by which such entry was to be effected was false and fraudulent statement of weights was sufficient to charge a conspiracy to defraud the United States. *Heike v. United States* (C. C. A. 2), 192 Fed. 83. *Affd.* 227 U. S. 131, 57 L. ed. 450, 33 Sup. Ct. 226, *Ann. Cas.* 1914C, 128.

Indictment was sufficient where defendants were not misled to their prejudice. *Smith v. United States* (C. C. A. 9), 231 Fed. 25. *Cert. den.* 242 U. S. 636, 61 L. ed. 439, 37 Sup. Ct. 19.

Indictment for conspiracy to defraud United States of revenue by smuggling and facilitating the transportation of liquor may be as general and indefinite as the conspiracy sought to be punished. *Bailey v. United States* (C. C. A. 5), 5 Fed. (2d) 437.

When otherwise sufficient averment in indictment charging violation of treaty may be treated as surplusage. *Ford v. United States* (C. C. A. 9), 10 Fed. (2d) 339.

Mistake in indictment in reference to statute involved was immaterial. *Hansen v. United States* (C. C. A. 5), 24 Fed. (2d) 104.

Indictment employing the words "unlawfully and feloniously," and omitting the words "fraudulently or knowingly" was sufficient. *Wishart v. United States* (C. C. A. 8), 29 Fed. (2d) 103.

It is competent to charge a single conspiracy to violate both the tariff and the prohibition acts. *Hogan v. United States* (C. C. A. 5), 48 Fed. (2d) 516.

Indictment for conspiracy to violate customs law was not duplicitous because it showed bribery of a sheriff in order to carry the conspiracy into effect. *Clark v. United States* (C. C. A. 5), 61 Fed. (2d) 409.

Indictment which was held sufficient is set out in *Goldberg v. United States* (C. C. A. 5), 61 Fed. (2d) 414.

Indictment charging conspiracy to possess illegal liquor, and to carry on business of retail liquor dealer without license, was sufficient. *Davis v. United States* (C. C. A. 5), 86 Fed. (2d) 45. *Cert. den.* 300 U. S. 657, 81 L. ed. 867, 57 Sup. Ct. 433.

Indictment charging conspiracy to carry on illegal distillery with intent to defraud government of taxes on spirits sufficiently complied with requirements as to intent and certainty and to advise defendants of charge against them. *Wainer v. United States* (C. C. A. 7), 87 Fed. (2d) 77. *Cert. den.* 300 U. S. 669, 81 L. ed. 876, 57 Sup. Ct. 511.

Where figures in an indictment charging conspiracy to evade income taxes purported to show defendant's true income, but could not be reconciled to defendant's books, it was entitled to a bill of particulars. *United States v. Empire State Paper Corp.* (D. C.-N. Y.), 8 Fed. Supp. 220.

Defrauding the United States.

The indictment need not set forth the means by which the fraud is to be consummated. *United States v. Gordon* (D. C.-Minn.), 22 Fed. 250; *Perrin v. United States* (C. C. A. 9), 169 Fed. 17.

Indictment for fraudulent preemption of public lands was good. *United States v. Gordon* (D. C.-Minn.), 22 Fed. 250.

Indictment, charging conspiracy to procure allowance of a false claim against government for survey of land, without alleging any act to carry it into effect, is fatally defective. *United States v. Reichert* (C. C.-Cal.), 32 Fed. 142.

Indictment for conspiracy to defraud the United States by obtaining the dismissal of certain suits by United States to recover lands was bad as not showing sufficiently the intent to defraud nor the overt act relied on. *United States v. Milner* (C. C.-Ala.), 36 Fed. 890.

Indictment for conspiracy to defraud United States was good, where it alleged scheme of railroad officials to transport old newspapers in order to increase weight of mails. *United States v. Newton* (D. C.-Iowa), 48 Fed. 218.

It is not sufficient to charge the conspiracy in the general language of the statute, but it must show that the scheme could have resulted in defraud-

ing. In re Benson (C. C.-Cal.), 58 Fed. 962.

The indictment need not show how the overt act would tend to effect the object, or that the object was accomplished. United States v. Benson (C. C. A. 9), 70 Fed. 591.

Indictment for conspiracy to defraud the United States by depriving it of certain lands by a fraudulent entry under the homestead laws was sufficient. Gantt v. United States (C. C. A. 5), 108 Fed. 61.

If the allowance and payment of a false claim constitutes the overt act relied upon, the facts relied upon as constituting the fraud, and not a general averment that the act was fraudulent, must be set forth in the indictment. United States v. Greene (D. C.-Ga.), 115 Fed. 343.

Allegations that defendants of the Eastern District of Virginia, did in the city of Washington, in the District of Columbia, and at Norfolk, Va., in the Eastern District of Virginia, and within the jurisdiction of this court, then and there unlawfully and corruptly conspire to defraud, did not show with any degree of accuracy within which jurisdiction it is proposed to charge the crime to have been committed. United States v. Marx (D. C.-Va.), 122 Fed. 964.

In indictment for illegal entry of dutiable goods, the intended means must be indicated in general, but the details need not be set out. United States v. Grunberg (C. C.-Mass.), 131 Fed. 137.

Indictment charging conspiracy to defraud the United States by exchanging lands of which the defendants would not have equitable title for public lands, sufficiently charged crime. United States v. Hyde (D. C.-Cal.), 132 Fed. 545. Affd. 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. 760.

An indictment for conspiracy to defraud the United States of public lands by false entries setting out overt acts need not specifically allege that such overt acts were done with knowledge of the falsity of the entries. United States v. Mitchell (C. C.-Ore.), 141 Fed. 666.

Indictment for conspiracy to defraud United States by obtaining land scrip by a false administration and sale of the rights of the decedent, a true claimant originally, was good. United States v. Bradford (C. C.-La.), 148 Fed. 413. Affd. 152 Fed. 616. Cert. den. 206 U. S. 563, 51 L. ed. 1190, 27 Sup. Ct. 795.

The essentials of a conspiracy are those that existed at common law, and they must be alleged in the indictment. Asgill v. United States (C. C. A. 4), 60 Fed. (2d) 780.

Indictment charging conspiracy to defeat the authority of the secretary of labor to deport aliens, charged a conspiracy to defraud the United States. United States v. Sotak (D. C.-Pa.), 2 Fed. Supp. 323.

Indictment for conspiracy to defraud the United States by violating terms and provisions of the federal prevailing rate law, was defective for failure to allege the prevailing rate of wage in defendant's locality. United States v. Terranova (D. C.-Cal.), 7 Fed. Supp. 989.

An indictment for conspiracy to defraud the United States which alleges overt acts, need not set out means contemplated to effect the fraud. United States v. Dennee (C. C.-La.), Fed. Cas. No. 14948, 3 Woods 47.

Duplicity—Joinder of Counts.

A single count for conspiring to commit two offenses is not bad for duplicity. Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. 249; John Gund Brew. Co. v. United States (C. C. A. 8), 206 Fed. 386; United States v. Aczel (D. C.-Ind.), 219 Fed. 917; Bryant v. United States (C. C. A. 5), 257 Fed. 378; Magon v. United States (C. C. A. 9), 260 Fed. 811; Norton v. United States (C. C. A. 5), 295 Fed. 136; Bailey v. United States (C. C. A. 5), 5 Fed. (2d) 437; Chapman v. United States (C. C. A. 5), 10 Fed. (2d) 124; McDonnell v. United States (C. C. A. 1), 19 Fed. (2d) 801. Cert. den. 275 U. S. 551, 72 L. ed. 421, 48 Sup. Ct. 114; Perry v. United States (C. C. A. 5), 39 Fed. (2d) 52. Cert. den. 281 U. S. 769, 74 L. ed. 1176, 50 Sup. Ct. 467; United States v. Illinois Alcohol Co. (C. C. A. 2), 45 Fed. (2d) 145. Cert. den. 282 U. S. 901, 75 L. ed. 794, 51 Sup. Ct. 214; Blum v. United States (C. C. A. 6), 46 Fed. (2d) 850; Hogan v. United States (C. C. A. 5), 48 Fed. (2d) 516. Cert. den. 284 U. S. 668, 76 L. ed. 565, 52 Sup. Ct. 42; Outlaw v. United States (C. C. A. 5), 81 Fed. (2d) 805. Cert. den. 298 U. S. 665, 80 L. ed. 1389, 56 Sup. Ct. 747; Center v. United States (C. C. A. 4), 96 Fed. (2d) 127.

Though the indictment shows in charging overt acts that the completed offense which was the object of the conspiracy

was committed, it is not bad for duplicity. *Stanley v. United States* (C. C. A. 8), 195 Fed. 896; *United States v. McKieghan* (D. C.-Mich.), 58 Fed. (2d) 298.

Indictment charging single continuous conspiracy, is not duplicitous, though setting forth acts at different times and places. *Stanley v. United States* (C. C. A. 8), 195 Fed. 896; *United States v. Rogers* (D. C.-N. Y.), 226 Fed. 512; *United States v. Austin-Bagley Corp.* (D. C.-N. Y.), 24 Fed. (2d) 527; *Sprague v. Aderholt* (D. C.-Ga.), 45 Fed. (2d) 790; *Dowdy v. United States* (C. C. A. 4), 46 Fed. (2d) 417; *Capriola v. United States* (C. C. A. 7), 61 Fed. (2d) 5. Cert. den. 287 U. S. 671, 77 L. ed. 579, 53 Sup. Ct. 315; *Arnstein v. United States*, 54 App. D. C. 199, 296 Fed. 946.

A charge under § 215, Penal Code (7 F. C. A., Title 18, § 338; U. S. C. A., Title 18, § 338; id. U. S. C.) for using mails to defraud, and a charge under Title 18, § 88 for conspiracy to commit such offense may be joined. *Sidebotham v. United States* (C. C. A. 9), 253 Fed. 417.

Count charging conspiracy to violate federal act was properly joined with counts charging violation of the act in the same indictment. *Caudle v. United States* (C. C. A. 8), 278 Fed. 710; *Goodfriend v. United States* (C. C. A. 9), 294 Fed. 148.

Indictment may charge in different counts conspiracy to violate different statutes, where the acts charged are continuous and the persons involved the same. *Powers v. United States* (C. C. A. 9), 293 Fed. 964.

Indictment charging in single count the entry of various defendants at different times during the continuance of the conspiracy was not duplicitous. *Norton v. United States* (C. C. A. 5), 295 Fed. 136.

An indictment is not rendered duplicitous by setting out manner and means of carrying out the conspiracy. *Hosier v. United States* (C. C. A. 5), 64 Fed. (2d) 657. Cert. den. 290 U. S. 677, 78 L. ed. 584, 54 Sup. Ct. 100.

Conspiracy may be charged in the same indictment with the main case. *United States v. Alluan* (D. C.-Tex.), 13 Fed. Supp. 289.

Election Laws.

Indictment for conspiracy to induce election officials at election in Indiana,

at which an election for a member of Congress was held, to violate the Indiana election laws, charged an offense against the United States. *In re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. 1263.

Indictment for conspiracy to violate election laws was bad because overt act was not alleged with certainty. *United States v. Watson* (D. C.-Miss.), 17 Fed. 145.

An indictment charging defendants of depriving certain negro voters of their right to vote was good, though it did not name the voters nor state that their names were to the grand jury unknown. *United States v. Stone* (D. C.-Md.), 188 Fed. 836.

Elkins Act.

An indictment alleging agents of the shipper and agents of the railroad, engaged in interstate commerce, stipulated to give and receive rebates on transportation of sugar, and thereafter gave and received such rebates in pursuance of such fraudulent conspiracy, was not sustainable as a conspiracy to commit an offense against the United States. *United States v. New York Cent. & H. R. Co.* (C. C.-N. Y.), 146 Fed. 298. Affd. 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. 304, and 212 U. S. 500, 53 L. ed. 624, 29 Sup. Ct. 309.

Indictment under Elkins Law charging both unlawful receipt of rebate and conspiracy to commit such offense was good. *United States v. Miller* (D. C.-Nebr.), 18 Fed. Supp. 389.

Escape of Enemy Alien.

In an indictment for conspiracy it is not necessary to show how the act charged to be an overt act would tend to effect the objects of the conspiracy. *De Lacey v. United States* (C. C. A. 9), 249 Fed. 625, L. R. A. 1918E, 1011.

Espionage Act.

An indictment charging a conspiracy to discourage, obstruct, and prevent, the prosecution by the United States of war with Germany, was sufficiently definite, it not being necessary to specify exact place where the conspiracy was formed, or the exact time, a continuing conspiracy being charged. *United States v. Pierce* (D. C.-N. Y.), 245 Fed. 878. Affd. 252 U. S. 239, 64 L. ed. 542, 40 Sup. Ct. 205. Opinion on motion for bill of particulars, 245 Fed. 888.

Where in the very nature of things the persons whom the conspiracy was designed to induce not to enlist would be unknown, an allegation giving their names or that their names were unknown to the grand jurors was unnecessary. *United States v. Prieth* (D. C.-N. J.), 251 Fed. 946.

The prosecution may join in the same indictment counts for publishing articles intended to discourage enlistment and to cause insubordination in the military forces, and for sending the same through the mails, and of conspiracy to commit such offenses. *Magon v. United States* (C. C. A. 9), 260 Fed. 811.

An accused person may be charged in the same indictment with the violation of more than one statutory provision without duplicity in the indictment. *Magon v. United States* (C. C. A. 9), 260 Fed. 811.

An indictment charging in different counts conspiracy to violate the Espionage Act by obstructing the recruiting and enlistment service of the United States, and using abusive language about the form of government, the Constitution, the flag, and uniform, was insufficient in that the overt acts charged did not tend to effect such violation. *United States v. Ault* (D. C.-Wash.), 263 Fed. 800.

In prosecution for conspiracy to hinder enforcement of the war acts, an indictment was sufficient which alleged the manner in which the hindrance was to be accomplished and set out the overt acts taken in its accomplishment. *Sykes v. United States* (C. C. A. 9), 264 Fed. 945. Cert. den. 254 U. S. 655, 65 L. ed. 459, 41 Sup. Ct. 218.

False or Fraudulent Claims against United States.

An indictment for conspiracy denounced by 7 F. C. A., Title 18, § 83; U. S. C. A., Title 18, § 83; id. U. S. C. is defective which does not allege the performance of any act in furtherance of the conspiracy. *United States v. Reichert* (C. C.-Cal.), 32 Fed. 142.

Indictment charging a conspiracy to defraud the United States by means of an agreement or combination intended to aid a certain railroad company in obtaining payment of a false and fraudulent claim for mail service was sufficient. *United States v. Newton* (D. C.-Iowa), 48 Fed. 218.

The words "agreement," "combination," and "conspiracy," considered to be used as synonymous in 7 F. C. A., Title 18, § 83; U. S. C. A., Title 18, § 83; id. U. S. C. *United States v. Patterson* (C. C.-Mass.), 55 Fed. 605.

Indictment for conspiring to obtain allowance of false claim must set out the means in detail by which the conspiracy charged was to be made effective. *United States v. Greene* (D. C.-Ga.), 115 Fed. 343.

Indictment charging conspiracy to defraud the United States Shipping Board Emergency Fleet Corporation, in violation of 7 F. C. A., Title 18, § 83; U. S. C. A., Title 18, § 83; id. U. S. C., was bad for failure to allege the formation of the conspiracy after October 23, 1918, the date of the amendment to the section rendering it criminal to defraud or conspire to defraud a corporation in which the United States owns stock. *United States v. Dobson* (D. C.-Pa.), 277 Fed. 126.

False Personation of Officer.

Indictment charging conspiracy to have certain person "unlawfully and feloniously assume and pretend to be an officer acting under the authority of the United States" and should in such assumed character with intent to defraud wrongfully obtain a thing of value, is not bad because of the omission of the word "falsely." *Ferguson v. United States* (C. C. A. 8), 293 Fed. 361.

Harrison Narcotic Act.

Indictment was good, where it charged that the conspiracy was formed at Chicago, and that in pursuance of the conspiracy defendant did deliver and sell and give away drugs at Chicago to the various persons alleged in the different overt acts set forth in the indictment. *Wallace v. United States* (C. C. A. 7), 243 Fed. 300. Cert. den. 245 U. S. 650, 62 L. ed. 531, 38 Sup. Ct. 11.

Averment that conspiracy continued during specified dates did not confine proof to events transpiring between those dates. Conspiracy and sale was properly joined in same indictment. *Hood v. United States*, 23 Fed. (2d) 472. Cert. den. 277 U. S. 588, 72 L. ed. 1002, 48 Sup. Ct. 436.

The venue will be sufficiently laid in the indictment though the crime be charged to have been committed at an unknown time and place. *Parmagini v.*

United States (C. C. A. 9), 42 Fed. (2d) 721.

Indictment charging concealment and conspiracy to conceal narcotic drugs "at the southern district of New York and within the jurisdiction of this court," described sufficiently the place of concealment. *United States v. Busch* (C. C. A. 2), 64 Fed. (2d) 27.

Indictment alleging two conspiracies to sell drugs, precisely alike in contents and personnel except for different sales, charged a single offense. *United States v. Mazzochi* (C. C. A. 2), 75 Fed. (2d) 497.

Interfering with Employees of Bureau of Animal Industry.

Indictment need not show that the cattle being dipped at time of conspiracy to prevent the execution of duties by employees of Bureau of Animal Industry were the subject of interstate commerce. *Thornton v. United States*, 271 U. S. 414, 70 L. ed. 1013, 46 Sup. Ct. 585, affg. (C. C. A. 5), 2 Fed. (2d) 561.

Interstate Commerce.

Indictment was fatally defective for not sufficiently identifying the offense which was the object of the conspiracy. *Anderson v. United States* (C. C. A. 8), 260 Fed. 557; *Lamar v. United States* (C. C. A. 2), 260 Fed. 561. Cert. den. 250 U. S. 673, 63 L. ed. 1200, 40 Sup. Ct. 16.

The conspiracy must be sufficiently charged, and it can not be aided by averments of overt acts done by one or more conspirators in furtherance of the conspiracy. *Anderson v. United States* (C. C. A. 8), 260 Fed. 557; *Lamar v. United States* (C. C. A. 2), 260 Fed. 561. Cert. den. 250 U. S. 673, 63 L. ed. 1200, 40 Sup. Ct. 16.

Intimidating or Corrupting Witnesses or Officers of Court.

Sufficiency of indictment in prosecution for obstructing administration of justice in Circuit Court of United States. *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. 542.

Indictment was sufficient, though misstating the section number of the statute descriptive of the substantive offense, since the facts showed the offense intended to be set out. *Harper v. United States* (C. C. A. 8), 27 Fed. (2d) 77.

Substantive offense need not be described with precision of an indictment

directly charging that offense. *Harper v. United States* (C. C. A. 8), 27 Fed. (2d) 77.

Indictment charging conspiracy to prevent a government witness from appearing at trial by instituting false prosecution against him, stated an offense under 7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88; id. U. S. C. *Harper v. United States* (C. C. A. 8), 27 Fed. (2d) 77.

Unnecessary to limit conspiracy to any particular case where indictment charges conspiracy to intimidate witnesses. *Etie v. United States* (C. C. A. 5), 55 Fed. (2d) 114.

Count charging conspiracy to violate 7 F. C. A., Title 18, §§ 232, 241; U. S. C. A., Title 18, §§ 232, 241; id. U. S. C. was not duplicitous. *Outlaw v. United States* (C. C. A. 5), 81 Fed. (2d) 805. Cert. den. 298 U. S. 665, 80 L. ed. 1389, 56 Sup. Ct. 747.

Indictment charging a conspiracy to obtain the dismissal of a prosecution, irrespective of guilt of defendant, was sufficient. *Craig v. United States* (C. C. A. 9), 81 Fed. (2d) 816. Cert. den. 298 U. S. 690, 80 L. ed. 1408, 56 Sup. Ct. 959.

Intoxicating Liquor Law.

Sufficiency of indictment to charge that the destination of liquor was in the Indian country. *Joplin Merc. Co. v. United States*, 236 U. S. 531, 59 L. ed. 705, 35 Sup. Ct. 291.

Indictment construed to charge the introduction of liquor into Indian country by means of intrastate shipments only. *Joplin Merc. Co. v. United States*, 236 U. S. 531, 59 L. ed. 705, 35 Sup. Ct. 291.

In an indictment for conspiracy to receive and conceal whisky after unlawful importation, it is not necessary to allege the facts relating to the importation of the whisky. *Goldberg v. United States* (C. C. A. 8), 277 Fed. 211.

Indictment charging conspiracy to steal alcohol from bonded warehouse and to transport such liquor sets forth a single offense. *Miller v. United States* (C. C. A. 7), 4 Fed. (2d) 228. Cert. den. 268 U. S. 692, 69 L. ed. 1160, 45 Sup. Ct. 511.

Indictment for conspiracy to transport liquor unlawfully will lie. *Welter v. United States* (C. C. A. 8), 4 Fed. (2d) 342.

Indictment describing the offense which was the subject of the conspiracy

was sufficient, though it failed to designate the section of the statute violated. *Olmstead v. United States* (C. C. A. 9), 19 Fed. (2d) 842, 53 A. L. R. 1472. Cert. den. 275 U. S. 557, 72 L. ed. 424, 48 Sup. Ct. 117.

Time and place of conspiracy, where unknown to grand jury, may be fixed by overt act alleged. *Rubio v. United States* (C. C. A. 9), 22 Fed. (2d) 766. Cert. den. 276 U. S. 619, 72 L. ed. 734, 48 Sup. Ct. 213.

Indictment was insufficient in that overt acts alleged were consistent with innocence of defendants. *United States ex rel. Jordan v. Glass* (C. C. A. 3), 25 Fed. (2d) 941. Cert. den. 278 U. S. 605, 73 L. ed. 532, 49 Sup. Ct. 11.

Where the indictment does not clearly exhibit a purpose to violate the statute creating the substantive offense, the indictment states no crime. *United States v. Goldman* (D. C.-Conn.), 28 Fed. (2d) 424.

Indictment held to state a conspiracy in violating regulations promulgated under 6A, F. C. A., Title 27, §§ 83, 85; U. S. C. A., Title 27, §§ 83, 85; id. U. S. C., though not stating statutory offense under §§ 13 and 49 thereof. *United States v. Austin-Bagley Corp.* (C. C. A. 2), 31 Fed. (2d) 229. Cert. den. 279 U. S. 863, 73 L. ed. 1002, 49 Sup. Ct. 479.

Charge of conspiracy to introduce intoxicating liquor into forbidden territory does not fail because of incompetency of one, with whom indictment charges defendants conspired, to become a conspirator. *De Mayo v. United States* (C. C. A. 8), 32 Fed. (2d) 472.

Indictment alleging conspiracy between various dates covering a period of six years sufficiently alleged time of offense. *United States v. Hosier* (D. C.-La.), 50 Fed. (2d) 971.

Indictment charging conspiracy to violate 7 F. C. A., Title 18, § 388; U. S. C. A., Title 18, § 388; id. U. S. C. sufficient though not negating exception. *Reing v. United States ex rel. Girard* (C. C. A. 3), 84 Fed. (2d) 624.

Joinder of Conspirators.

It is not necessary to join all coconspirators or to explain why they were not indicted. *Katz v. United States* (C. C. A. 1), 273 Fed. 157. Cert. den. 257 U. S. 641, 66 L. ed. 412, 42 Sup. Ct. 52; *United States v. Heitler* (D. C.-Ill.), 274 Fed. 401; *Goldberg v. United States* (C. C. A. 5), 297 Fed. 98.

One conspirator may be singly indicted and convicted if the charge is against a plurality which includes the accused. *Vannata v. United States* (C. C. A. 2), 289 Fed. 424.

Indictment not naming coconspirators, and alleging they were unknown to the grand jury, was sufficient. *Leverkuhn v. United States* (C. C. A. 5), 297 Fed. 590. Cert. den. 266 U. S. 603, 69 L. ed. 463, 45 Sup. Ct. 91; *Briggs v. United States* (C. C. A. 5), 297 Fed. 593; *United States v. Stein* (C. C. A. 2), 50 Fed. (2d) 1025. Cert. den. 284 U. S. 671, 76 L. ed. 568, 52 Sup. Ct. 126.

It is not necessary to charge a particular defendant with a particular act. *United States v. Olmstead* (D. C.-Wash.), 5 Fed. (2d) 712.

Kidnaping.

Repetition of an allegation of knowledge as to each overt act committed in furtherance of a conspiracy to kidnap was not required. *Shannon v. United States* (C. C. A. 10), 76 Fed. (2d) 490.

Indictment and evidence in charge of conspiracy to kidnap was sufficient. *Shannon v. United States* (C. C. A. 10), 76 Fed. (2d) 490.

The use of the words "victim" and "hideout" in an indictment charging conspiracy to kidnap was not reversible error. *Sawyer v. United States* (C. C. A. 8), 89 Fed. (2d) 139.

Lottery Tickets, Importing.

Indictment containing allegation that defendant conspired to cause tickets to be deposited for interstate carriage, as well as to be received, and allegation of acts done in furtherance of conspiracy was sufficient. *United States v. McGuire* (C. C. A. 2), 64 Fed. (2d) 485. Cert. den. 290 U. S. 645, 78 L. ed. 560, 54 Sup. Ct. 63.

Military Expeditions.

Indictment for conspiracy to set on foot a military expedition against a nation with which the United States are at peace was insufficient. *United States v. Bopp* (D. C.-Cal.), 230 Fed. 723.

Misbranding Food.

Indictment charging a conspiracy to ship adulterated food and drugs was not duplicitous where it specified that the shipment to be made was fluid extract of ginger. *United States v. Lesser* (C. C. A. 2), 66 Fed. (2d) 612.

Motor Vehicle Theft Act.

A conspiracy to violate 7 F. C. A., Title 18, § 408; U. S. C. A., Title 18, § 408; *id.* U. S. C., and the completed violation, are separate offenses, both felonies and consequently of the same grade, and an indictment need not charge all defendants with the completed crime. *Waldeck v. United States* (C. C. A. 7), 2 Fed. (2d) 243. Cert. den. 267 U. S. 595, 69 L. ed. 805, 45 Sup. Ct. 232.

An indictment for conspiracy to transport, conceal, and sell stolen automobiles, knowing the automobiles to have been stolen, which follows the statute, was good against the objection that it did not allege: (1) That the automobiles had been previously stolen; (2) the names of the true owners; and (3) localities where the thefts occurred. *Grace v. United States* (C. C. A. 5), 4 Fed. (2d) 658. Cert. den. 269 U. S. 702, 69 L. ed. 1165, 45 Sup. Ct. 637.

National Banking Laws.

In a conspiracy to violate R. S., § 5209 (4 F. C. A., Title 12, § 592; U. S. C. A., Title 12, § 592; *id.* U. S. C.) by making false entries in the certificate of deposit register of a national bank, the indictment was good though it did not aver that the false entries were intended to be made by the bank officer himself. *Scott v. United States* (C. C. A. 6), 130 Fed. 429.

In indictment for aiding and abetting and conspiring with national bank officer to defraud the bank, it is not essential to allege that the defendant knew that the bank was a national bank. *Reynolds v. United States* (C. C. A. 9), 67 Fed. (2d) 216.

Obstructing Justice.

In an indictment under 7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88; *id.* U. S. C., an allegation of conspiracy to commit the "offense of corruptly endeavoring to influence a petit jury" in a Circuit Court of the United States in the discharge of its duty in a certain case, is insufficient as not stating the facts relied on as constituting any offense. *United States v. Taffe* (D. C.-Ore.), 86 Fed. 113.

In indictment for conspiracy to obstruct the administration of justice by influencing the actions of officials by political influence, things of value, sums of money "gratuitously," the word "gratuitously" may be omitted as sur-

plusage. *Craig v. United States* (C. C. A. 9), 81 Fed. (2d) 816. Cert. den. 298 U. S. 690, 80 L. ed. 1408, 56 Sup. Ct. 959.

Opium Act.

Where the overt acts are alleged to have been committed in pursuance of the alleged conspiracy, and to effect and accomplish its object, it is unnecessary to allege that the overt acts were knowingly and fraudulently done. *Jung Quey v. United States* (C. C. A. 9), 222 Fed. 766.

Sufficiency of indictment to state a case of conspiracy to violate Act Jan. 17, 1914, ch. 9, 38 Stat. 275, regulating importation of opium. *Shepard v. United States* (C. C. A. 9), 236 Fed. 73; *Thurston v. United States* (C. C. A. 5), 241 Fed. 335. Cert. den. 245 U. S. 646, 62 L. ed. 529, 38 Sup. Ct. 9.

Indictment for conspiracy to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of opium in violation of Act of 1909 as amended Jan. 17, 1914, ch. 9, 38 Stat. 275, was sufficient, though persons receiving the opium were omitted since such persons may be innocent of the conspiracy. *Iponmatsu Ukichi v. United States* (C. C. A. 9), 281 Fed. 525.

Overt Acts.

No overt act need be alleged or proved against each defendant, but only as having been performed by at least one of them after a conspiracy was entered into. *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. 467; *Onderdonk v. United States* (C. C. A. 5), 16 Fed. (2d) 116.

Averments of overt acts can not be resorted to in aid of averments of conspiracy. *Joplin Merc. Co. v. United States*, 236 U. S. 531, 59 L. ed. 705, 35 Sup. Ct. 291; *United States v. Baker* (D. C.-R. I.), 243 Fed. 741; *United States v. Vannata* (D. C.-N. Y.), 278 Fed. 559; *United States v. Dowling* (D. C.-Fla.), 278 Fed. 630; *United States ex rel. Clark v. Mathues* (D. C.-Pa.), 17 Fed. (2d) 187; *Luxenberg v. United States* (C. C. A. 4), 45 Fed. (2d) 497. Cert. den. 283 U. S. 820, 75 L. ed. 1436, 51 Sup. Ct. 345.

The overt act need not be shown by the indictment as one which would effect the purpose of the conspiracy; it is enough if it appears to have been done by a conspirator with the purpose of effecting or aiding the conspiracy. *United*

States v. Sanche (C. C.-Tenn.), 7 Fed. 715; Stephens v. United States (C. C. A. 9), 41 Fed. (2d) 440. Cert. den. 282 U. S. 880, 75 L. ed. 777, 51 Sup. Ct. 83; United States v. Donan (C. C.-N. Y.), Fed. Cas. No. 14983, 11 Blatchf. 168.

R. S., § 5440 (7 F. C. A., Title 18, § 88; U. S. C. A., Title 18, § 88; id. U. S. C.) as amended by Act of May 17, 1879, qualifies R. S., § 5438 (Title 18, § 85) and requires an overt act to be alleged and proved. United States v. Reichert (C. C.-Cal.), 32 Fed. 142.

Indictment must allege execution of an act to carry out the conspiracy. United States v. Reichart (C. C.-Cal.), 32 Fed. 142; United States v. Hency (D. C.-Tex.), 286 Fed. 165; Blaine v. United States (C. C. A. 5), 29 Fed. (2d) 651. Cert. den. 279 U. S. 845, 73 L. ed. 990, 49 Sup. Ct. 342; United States v. Boyden (C. C.-Mass.), Fed. Cas. No. 14632, 1 Lowell 266; United States v. Walsh (C. C.-Mo.), Fed. Cas. No. 16636, 5 Dill. 58.

Indictment must allege at least one overt act by at least one conspirator. Jung Quey v. United States (C. C. A. 9), 222 Fed. 766; Harrison v. Moyer (D. C.-Ga.), 224 Fed. 224; Tillinghast v. Richards (D. C.-R. I.), 225 Fed. 226; Erie R. Co. v. Schmidt (C. C. A. 3), 226 Fed. 513.

It is not necessary, in alleging overt acts in an indictment, to set forth in what manner the several overt acts tended to effect the purpose of the conspiracy. United States v. United States Brewers Assn. (D. C.-Pa.), 239 Fed. 163.

Averment of overt act in indictment is not intended to be a statement of the object of the conspiracy. Baugh v. United States (C. C. A. 9), 27 Fed. (2d) 257. Cert. den. 278 U. S. 639, 73 L. ed. 554, 49 Sup. Ct. 34.

Averment of visits made to a specified place "in pursuance of and to effect the object" of the conspiracy was a sufficient allegation of overt act. Heskett v. United States (C. C. A. 9), 58 Fed. (2d) 897. Cert. den. 287 U. S. 643, 77 L. ed. 556, 53 Sup. Ct. 89.

That indictment against 59 persons set out 109 overt acts did not render it bad. Capriola v. United States (C. C. A. 7), 61 Fed. (2d) 5. Cert. den. 287 U. S. 671, 77 L. ed. 579, 53 Sup. Ct. 315.

Indictment charging conspiracy to obstruct Reconstruction Finance Corporation was sufficient though statute covering overt act might be unconstitutional.

Langer v. United States (C. C. A. 8), 76 Fed. (2d) 817.

It is no defense that each act of a conspirator in furtherance of the crime is not set out in the indictment. Laska v. United States (C. C. A. 10), 82 Fed. (2d) 672. Cert. den. 298 U. S. 689, 80 L. ed. 1407, 56 Sup. Ct. 957.

Overt acts need not be pleaded with fullness necessary if they were themselves charged as crimes, and they need not in themselves, be criminal. Davis v. United States (C. C. A. 5), 86 Fed. (2d) 45. Cert. den. 300 U. S. 657, 81 L. ed. 867, 57 Sup. Ct. 433.

As overt acts are merely steps in furtherance of the conspiracy, indictment need not show connection of each act with the conspiracy. United States v. Shively (D. C.-Va.), 15 Fed. Supp. 107.

The averment of the overt act must be of some act which constitutes a part of the conspiracy, but some element only of the crime need be alleged. United States v. Noble (D. C.-N. Y.), 18 Fed. Supp. 808.

The offense which the defendants conspired to commit need not be stated with that particularity which would be required in an indictment charging the offense itself. United States v. Noble (D. C.-N. Y.), 18 Fed. Supp. 808.

To allege that the overt act was done "in pursuance" of the conspiracy is equivalent to the statutory words "to effect the object of the conspiracy." United States v. Boyden (C. C.-Mass.), Fed. Cas. No. 14632, 1 Lowell 266.

Perjury—Subornation of Perjury.

An indictment alleging a conspiracy to suborn perjury need not describe, with technical precision, all the elements essential to the commission of the crime of subornation of perjury. Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. 163.

Counts charging conspiracy to violate 7 F. C. A., Title 18, §§ 232, 241; U. S. C. A., Title 18, §§ 232, 241; id. U. S. C. was not duplicitous. Outlaw v. United States (C. C. A. 5), 81 Fed. (2d) 805. Cert. den. 298 U. S. 665, 80 L. ed. 1389, 56 Sup. Ct. 747.

Postal Laws.

Indictment charging postmaster and others of conspiring to sell and purchase stamps to be used at other post-offices to increase fraudulently his salary was

sufficient. *United States v. Foster*, 233 U. S. 515, 58 L. ed. 1074, 34 Sup. Ct. 666.

Postal Laws, Obscene or Libelous Matter.

An indictment charging a conspiracy to extort money on a threat of informing against the violation need not allege that the person who was the object of the conspiracy had violated any law or had reasonable grounds for believing or did believe that he had violated any law. *Roberts v. United States (C. C. A. 9)*, 248 Fed. 873. Cert. den. 247 U. S. 522, 62 L. ed. 1247, 38 Sup. Ct. 583.

Where the indictment charges that the printed matter was of a character to incite murder and assassination it is not necessary that the matter be set out in the indictment. *United States v. Wells (D. C.-Wash.)*, 262 Fed. 833.

Postal Laws, Obstructing the Mail.

Indictment for conspiracy to obstruct the mails, failing to allege defendants "knowingly and wilfully" conspired was fatally defective. *Conrad v. United States (C. C. A. 5)*, 127 Fed. 798.

It is not necessary to allege an unlawful criminal intent in the indictment. *Taylor v. United States (C. C. A. 7)*, 2 Fed. (2d) 444. Cert. den. 266 U. S. 634, 69 L. ed. 479, 45 Sup. Ct. 226.

Postal Laws, Robbing Mail.

Indictment was good where it charged one with conspiring by force and violence to rob one of certain mail which constituted part of the United States mails under the control of the post-office establishment. *Vane v. United States (C. C. A. 9)*, 254 Fed. 28.

Indictment alleging possession of specific bonds "and other bonds" was sufficient to render competent evidence of possession of bonds other than those particularly described. *Murdick v. United States (C. C. A. 8)*, 15 Fed. (2d) 965. Cert. den. 274 U. S. 752, 71 L. ed. 1332, 47 Sup. Ct. 765.

Counts of indictment charging conspiracy to assault and conspiracy to rob mail custodian charged a single offense. *Bertsch v. Snook (C. C. A. 5)*, 36 Fed. (2d) 155.

Postal Laws, Using Mails to Defraud.

The exact place of the formation of the conspiracy need not be stated where the venue is laid at the place where an

overt act was committed. *Brown v. Elliott*, 225 U. S. 392, 56 L. ed. 1136, 32 Sup. Ct. 812.

A count for a conspiracy may be joined with counts charging the commission of the offense. *United States v. Clark (D. C.-Pa.)*, 125 Fed. 92. Affd. 138 Fed. 294.

Allegations in indictment alleging conspiracy to defraud by "dealing and pretending to deal" in what is called "green articles" and "spurious Treasury notes" are not repugnant. *Lehman v. United States (C. C. A. 2)*, 127 Fed. 41.

An indictment sufficiently charges a conspiracy to commit an offense against the United States when it charges a conspiracy to devise a scheme to defraud and to execute such scheme by opening correspondence through the mails. *Wilson v. United States (C. C. A. 2)*, 190 Fed. 427.

Indictment not fatally defective which designated wrong statute, where conspiracy to use mails to defraud was charged. *Ex parte King (D. C.-Ga.)*, 200 Fed. 622.

Indictment was not bad because the charging part did not allege that defendants conspired and did commit the offense of attempting to defraud. *United States v. Maxey (D. C.-Ark.)*, 200 Fed. 997.

A count charging that the defendants unlawfully conspired together for the purpose of executing said scheme and artifice to defraud and attempting to do so, to place and cause to be placed letters in the post-office sufficiently averred a conspiracy to use the mail in execution of a scheme to defraud. *Freeman v. United States (C. C. A. 9)*, 241 Fed. 801. Cert. den. 245 U. S. 654, 62 L. ed. 533, 38 Sup. Ct. 12.

The charging of an overt act after the conspiracy was formed and before it was terminated was sufficient. *Wilson v. United States (C. C. A. 2)*, 275 Fed. 307. Cert. den. 257 U. S. 649, 66 L. ed. 416, 42 Sup. Ct. 57.

In a prosecution for conspiring to use, and using, the mails in furtherance of a scheme to defraud, where under the scheme the defendants could not know the persons who would be injured, the indictment need not name the persons to be injured but it is sufficient if it alleged to defraud, "a certain class of persons then resident in divers states of the United States." *Ader v. United States*

(C. C. A. 7), 284 Fed. 13. Cert. den. 260 U. S. 746, 67 L. ed. 493, 43 Sup. Ct. 247.

Indictment was insufficient where defendants were charged with conspiracy to use the mails to defraud. *United States v. Morse* (D. C.-Conn.), 287 Fed. 906.

While the essential element of the conspiracy is the intent to use the mails, the overt acts to carry out the purpose need not necessarily embrace the use of the mails. *Morris v. United States* (C. C. A. 8), 7 Fed. (2d) 785. Cert. den. 270 U. S. 640, 70 L. ed. 775, 46 Sup. Ct. 205.

Allegation of conspiring includes element of intent. *Chew v. United States* (C. C. A. 8), 9 Fed. (2d) 348.

Count charging using of mail to defraud was improperly joined with charges of concealing and conspiring to conceal assets. *Beaux Arts Dresses v. United States* (C. C. A. 2), 9 Fed. (2d) 531. Cert. den. 270 U. S. 644, 70 L. ed. 777, 46 Sup. Ct. 210.

Allegation that defendants conspired that mail should be used is necessary. *Tincher v. United States* (C. C. A. 4), 11 Fed. (2d) 18.

An indictment charging a scheme to sell negotiable instruments fraudulently through the mails is not defective for charging the defendant as a principal though the evidence may show that he was an aider and abettor. *Cochran v. United States* (C. C. A. 8), 41 Fed. (2d) 193.

The indictment need not upon its face show in what manner the overt act contributed to the furtherance of the conspiracy. *Stephens v. United States* (C. C. A. 9), 41 Fed. (2d) 440. Cert. den. 282 U. S. 880, 75 L. ed. 777, 51 Sup. Ct. 83.

Failure to allege that defendants purposed to use the mails in their scheme to defraud, did not render indictment insufficient. *United States v. Shurtleff* (C. C. A. 2), 43 Fed. (2d) 944.

Indictment need not allege that names to which letters were directed were assumed. *Aycock v. United States* (C. C. A. 9), 62 Fed. (2d) 612. Cert. den. 289 U. S. 734, 77 L. ed. 1482, 53 Sup. Ct. 595.

Denial of bill of particulars in mail fraud case was not reversible error where defendants were permitted to examine such books and records of the corporation named in the indictment as may be in the possession of the United States

attorney or the post-office inspectors. *Williams v. United States* (C. C. A. 9), 93 Fed. (2d) 685.

In an indictment charging in 13 counts that defendants used the mails to defraud, a 14th count which charges that defendants conspired to commit an offense against the United States is sufficient although it does not charge a conspiracy to defraud by using the mails. *United States v. Womack* (C. C. A. 7), 98 Fed. (2d) 742.

Indictment charging scheme to defraud by the use of the mails to sell stock to the public at an artificial price created by artificial manipulation, stated an offense. *United States v. Brown* (D. C.-N. Y.), 5 Fed. Supp. 81.

Indictment was sufficient as against contention it did not charge the false representations were a part of the scheme, or made in execution thereof. *United States v. Stevens* (D. C.-N. Y.), 13 Fed. Supp. 909.

Prize-Fight Films Act.

Indictment was sufficient to charge conspiracy to violate law by interstate transportation of prize-fight films. *United States v. Johnston* (D. C.-N. Y.), 232 Fed. 970; *Cullen v. Esola* (D. C.-Cal.), 21 Fed. (2d) 877.

Public Land Laws.

In charging conspiracy to defraud United States by means of false entries under homestead laws, it is not necessary to specify tracts by number of section, township, and range. *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. 680.

Indictment will not lie where only acts charged were acts legally permissible under the land laws. *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. 181; *United States v. Sullenberger*, 211 U. S. 522, 53 L. ed. 311, 29 Sup. Ct. 186; *Fain v. United States* (C. C. A. 8), 209 Fed. 525.

Indictment charging conspiracy to divest United States of its title to land was not sufficient where conspiracy was to deprive United States of possession of land for an indefinite period. *United States v. Thompson* (C. C.-Ore.), 29 Fed. 86.

It is only necessary to allege that the defendants did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together to defraud the United

States of the title and possession of large tracts of public lands by means of false, feigned, illegal, and fictitious entries of lands under the homestead laws and set out the overt act. *United States v. Mitchell* (C. C.-Ore.), 141 Fed. 666.

An indictment charging several separate conspiracies is duplicitous. *United States v. Biggs* (D. C.-Colo.), 157 Fed. 264. *Affd.* 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. 181.

Selective Draft Act.

While it is impossible to conspire to violate a law prior to its passage, such objection to the indictment was obviated by the allegation "After said law had been duly enacted continued in their said conspiracy." *United States v. Wells* (D. C.-Wash.), 262 Fed. 833.

741. Application for Warrant of Removal.

(Caption.)

To Judge of the District Court of the United States for the Northern District of Illinois;

The United States of America, by —, United States attorney for the aforesaid district, respectfully shows as follows:

On — —, 19—, the grand jury of the United States in and for the Southern District of New York returned an indictment in the District Court for that district, charging John Doe with [general description of the crime in the indictment] in violation of the Act of Congress of —, and the said John Doe now stands so indicted. A certified copy of the said indictment is submitted with this application and made a part thereof.

Said John Doe not having been found within the Southern District of New York, and it appearing that he has fled to and is at present within your district, and was apprehended in your district by virtue of a warrant issued by —; and the said John Doe having been brought before said — Esq., United States Commissioner for this district for hearing, and the said commissioner, after due consideration, having committed him to the custody of the marshal for your district pending his removal to the Southern District of New York for trial upon said indictment in the District Court thereof, petitioner respectfully prays that this court may issue its warrant ordering the removal of the said John Doe to the Southern District of New York for trial upon the said indictment.

United States attorney.

Date—.

Cross-Reference.

Commitment, see notes to Form 725.

Statutory Reference.

Arrest, commitment and removal, 7 F. C. A., Title 18, § 591; U. S. C. A., Title 18, § 591; *id.* U. S. C.

NOTES TO DECISIONS

In General.

Inquiry as to probable cause may take place in advance of indictment or without

the production of an indictment, the indictment not being regarded as a pleading, but merely as evidence of the com-

mission of an offense. *Fetters v. United States ex rel. Cunningham*, 283 U. S. 638, 75 L. ed. 1321, 51 Sup. Ct. 596.

While hearings are being held before a United States commissioner upon a charge, the United States attorney may cause an information to be filed, but before leave will be granted, the government must show probable cause of guilt. *United States v. Quaritius* (D. C.-N. Y.), 267 Fed. 227.

The District Court has power to permit an information to be filed charging the commission of a federal offense, even though proceedings had been begun by a commissioner. *United States v. Metzger* (D. C.-N. Y.), 270 Fed. 291.

Accused not discharged on habeas corpus for defects in arrest or commitment, if government shows sufficient ground for detention. *Wong v. Esola* (C. C. A. 9), 6 Fed. (2d) 828.

Any individual may complain of the infraction of a law, and it is the duty of a judge to issue a warrant whenever complaint is made to him, on oath. *United States v. Skinner* (C. C.-N. Y.), Fed. Cas. No. 16309, 2 Wheeler Crim. Cas. 232.

Defects in Charges.

A seal of office is not required on the warrant of a commissioner. *Starr v. United States*, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. 919.

It is a vital objection that the indictment was found by a grand jury without jurisdiction. *Ex parte Salinger* (C. C. A. 2), 288 Fed. 752.

It is not incumbent upon the court to inquire into the legal sufficiency of each and every charge in the several indictments or to determine that there is probable cause as to each charge. The application is but a single proceeding and if probable cause is shown in one case, removal must follow. *Ex parte Littleton* (D. C.-Cal.), 1 Fed. (2d) 752. *Affd.* 6 Fed. (2d) 209. *Cert. den.* 269 U. S. 562, 70 L. ed. 413, 46 Supt. Ct. 21.

Right to bill of particulars on account of alleged indefiniteness of the indictment is for the determination of the trial court, and not of the court considering petition for removal. *United States v. Fogel* (D. C.-Minn.), 22 Fed. (2d) 823; *United States v. Mayer* (D. C.-Pa.), 22 Fed. (2d) 827.

Absence of the indorsement "a true bill" on an indictment, and absence of a statement in the clerk's certificate that the indictment was returned in open

court, did not nullify the effect of such indictment and such certified copy thereof in removal proceedings. *United States ex rel. Louis v. Laubheimer* (C. C. A. 7), 71 Fed. (2d) 814.

Indictment is not necessary for removal, the indictment offered in evidence may be fatally defective, but this of itself would not invalidate the order of removal. *United States ex rel. Louis v. Laubheimer* (C. C. A. 7), 71 Fed. (2d) 814.

The committing magistrate may refuse a warrant of removal if the indictment is fatally defective in essential averments. *In re Buell* (C. C.-Mo.), Fed. Cas. No. 2102, 3 Dill. 116.

Form and Sufficiency of Charge.

A conspiracy charged against a department employee to give out advance information of crop reports, and a conspiracy to bribe for the same purpose, sufficiently show offenses against the United States, for the purpose of removal to the District of Columbia. *Haas v. Henkel*, 216 U. S. 462, 54 L. ed. 569, 30 Sup. Ct. 249, 17 Ann. Cas. 1112; *Price v. Henkel*, 216 U. S. 488, 54 L. ed. 581, 30 Sup. Ct. 257.

One good count in an indictment under which a trial may be had in the district to which removal is sought is enough to support an order for removal. *Price v. Henkel*, 216 U. S. 488, 54 L. ed. 581, 30 Sup. Ct. 257; *United States ex rel. Primakow v. Hecht* (D. C.-N. Y.), 7 Fed. (2d) 133; *Lamar v. Splain*, 42 App. D. C. 300. *App. dism.* 235 U. S. 695, 59 L. ed. 430, 35 Sup. Ct. 209.

Informations or complaints based upon the mere belief of affiants are insufficient. *United States v. Tureaud* (C. C.-La.), 20 Fed. 621; *United States v. Collins* (D. C.-Cal.), 79 Fed. 65; *United States v. Sapinkow* (C. C.-N. Y.), 90 Fed. 654; *In re Rule of Court* (C. C.-Ga.), Fed. Cas. No. 12126, 3 Woods 502.

A complaint, sworn to on information and belief, charging theft, evidence tending to prove the offense, and an indictment showing that the prisoner was wanted, is sufficient warrant for removal. *In re Price* (C. C.-N. Y.), 83 Fed. 830. *Affd.* 89 Fed. 84.

A complaint made by a United States attorney, upon information and belief alone, is not insufficient because not referring to an indictment nor the grounds of belief. *In re Richter* (D. C.-Wis.), 100 Fed. 295.

Complaint by a consul of a foreign country where a crime was alleged to have been committed, reciting the facts and showing his official title, is sufficient. *In re Grin* (C. C.-Cal.), 112 Fed. 790. *Affd.* 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. 98.

If the indictment does not charge an offense, the accused should be dismissed. *In re Benson* (C. C.-N. Y.), 131 Fed. 968; *Ex parte Black* (D. C.-Wis.), 147 Fed. 832; *Pereles v. Weil* (D. C.-Wis.), 157 Fed. 419; *United States v. Pope* (D. C.-Mass.), Fed. Cas. No. 16069.

Complaint to which was attached a copy of the indictment and proof of identity was sufficient to support arrest and removal. *Pereles v. Weil* (D. C.-Wis.), 157 Fed. 419; *United States v. Jordan* (D. C.-Pa.), 22 Fed. (2d) 702; *Bonaventura v. United States* (C. C. A. 9), 55 Fed. (2d) 833; *United States ex rel. Maggio v. Schneider* (C. C. A. 3), 69 Fed. (2d) 50; *Trawczynski v. United States* (C. C. A. 7), 89 Fed. (2d) 922.

On an application for removal of an offender against the United States, the court of application is required only to examine the indictment to ascertain whether a crime is charged therein, and not for its technical accuracy. *United States v. Lyman* (D. C.-Ore.), 190 Fed. 414; *Ex parte Hyde* (C. C.-Cal.), 194 Fed. 207; *Conetto v. United States* (C. C. A. 9), 251 Fed. 42.

Under 7 F. C. A., Title 18, § 591; U. S. C. A., Title 18, § 591; *id.* U. S. C., a complaint, the basis of an application for removal of accused to another district, which charges a conspiracy against the United States must charge an overt act constituting a violation of law. *United States v. Ruroede* (D. C.-N. Y.), 220 Fed. 210; *United States ex rel. Maggio v. Schneider* (C. C. A. 3), 68 Fed. (2d) 50.

Where indictment charging neglect and refusal to support wife in violation of Act Mar. 23, 1906, did not describe the accused as a "person in the District of Columbia," denial of motion for warrant of removal to District of Columbia was proper. *United States ex rel. Smith v. Mathues* (D. C.-Pa.), 284 Fed. 368.

An information charging the commission of a misdemeanor, filed by a district attorney of the United States, is not required to be based on personal knowledge and a showing of probable cause, unless such information is made the basis of an application for a warrant of arrest. *Keilman v. United States* (C. C. A. 5), 284 Fed. 845.

On application for removal, the indictment must describe the accused sufficiently to identify him. *Duffy v. Keville* (D. C.-Mass.), 16 Fed. (2d) 828.

Complaint before commissioner which sufficiently apprised defendant of the nature of the offense charged was sufficient to warrant an order of removal. *United States v. Wood* (D. C.-Tex.), 26 Fed. (2d) 908. *Affd.* 26 Fed. (2d) 912.

Where a complaint by an immigration officer sufficiently charges an offense under the immigration law; that the offender was indicted and that he is now a fugitive from the warrant of arrest issued, a warrant of arrest issued on such complaint and the commitment were in conformity to law. *Adair v. Benn* (C. C. A. 9), 27 Fed. (2d) 126.

Complaint on information and belief was insufficient to warrant arrest, and defect was not cured by waiver of examination. *United States ex rel. King v. Gokey* (D. C.-N. Y.), 32 Fed. (2d) 793.

Indictment properly charging crime raises a prima facie case in favor of removal, identity of defendant being admitted. *United States ex rel. Shapiro v. Schneider* (C. C. A. 3), 56 Fed. (2d) 370.

Indictment must show offense committed in district to which removal is sought. *United States ex rel. Starr v. Mulligan* (C. C. A. 2), 59 Fed. (2d) 200.

Indictment for conspiracy to smuggle liquor was sufficient to support removal to another district for trial. *Kearns v. Keville* (C. C. A. 1), 67 Fed. (2d) 566.

An affidavit for complaint for unlawful use of a citizenship certificate which does not state how such use was unlawful did not show a probable cause. *In re Coleman* (C. C.-N. Y.), Fed. Cas. No. 2980, 15 Blatchf. 406.

742. Warrant of Removal.

District Court of the United States

_____ District of _____

_____ Division

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the marshal of the United States for the _____ District of _____ and to his deputies or any or either of them:

Whereas, _____ ha— been brought before me upon a commitment made by a United States commissioner in this district for the purpose of obtaining a warrant for the removal of the said _____ to the _____ District of _____, in which district the offense for which said prisoner— ha— been committed is to be tried, a copy of which commitment is hereto annexed.

And whereas, the United States attorney for the _____ District of _____ has made application to me under the provisions of U. S. C., Title 18, section 591, for a warrant for the removal of said prisoner— to the said _____ District of _____, and an examination of the matter having been made by me, now, therefore, you are hereby commanded to remove said prisoner— now in your custody forthwith to the said _____ District of _____, and there deliver _____ to the United States marshal for the _____ District of _____, or some other proper officer authorized to receive the said prisoner—, in order that —he— may be dealt with according to law.

Given under my hand and seal of the United States District Court for the _____ District of _____, at the city of _____, this _____ day of _____, 19—.

United States district judge.

ATTEST:

Clerk.

UNITED STATES MARSHAL'S RETURN

_____ District of _____, ss:

Received the within writ the _____ day of _____, 19—, and executed same.

United States marshal.

By _____

Deputy marshal.

Cross-References.

Bench warrant, Form 743.

Capias, Form 744.

Testing validity of removal proceedings, Forms 785 to 798.

Warrant of arrest, Form 725.

See notes to Forms 726, 741.

Statutory References.

Writ as jailer's authority, 7 F. C. A., Title 18, § 603; U. S. C. A., Title 18, § 603; id. U. S. C.

Writ for removal of prisoner, 7 F. C. A., Title 18, § 604; U. S. C. A., Title 18, § 604; id. U. S. C.

Writ, several indictments against the same person, 7 F. C. A., Title 18, § 602; U. S. C. A., Title 18, § 602; id. U. S. C.

Writ to bring prisoner into court, 7 F. C. A., Title 18, § 605; U. S. C. A., Title 18, § 605; id. U. S. C.

743. Bench Warrant.

District Court of the United States

_____ District of _____

_____ Division

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the marshal for the _____ District of _____, Greeting:

You are hereby commanded that you apprehend _____ and him immediately have before the United States District Court for the _____ District of _____ at _____ to answer unto an _____ contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable _____, United States district judge at _____ this _____ day of _____, 19____.

Clerk.

By _____
Deputy clerk.

UNITED STATES MARSHAL'S RETURN

_____ District of _____, ss:

Received the within writ the _____ day of _____, 19____, and executed same.

United States marshal.

By _____
Deputy marshal.

Cross-References.

Capias, Form 744.
Warrant of arrest, Form 725.
Warrant of removal, Form 742.
See notes to Form 726.

Statutory References.

Writ as jailor's authority, 7 F. C. A., Title 18, § 603; U. S. C. A., Title 18, § 603; id. U. S. C.

Writ for removal of prisoner, 7 F. C. A., Title 18, § 604; U. S. C. A., Title 18, § 604; id. U. S. C.

Writ, several indictments against same person, 7 F. C. A., Title 18, § 602; U. S. C. A., Title 18, § 602; id. U. S. C.

Writ to bring prisoner into court, 7 F. C. A., Title 18, § 605; U. S. C. A., Title 18, § 605; id. U. S. C.

NOTES TO DECISIONS

In General.

A bench warrant and warrant of commitment after indictment should state the

fact of indictment and offense. *Cassett v. Chase*, 91 Fla. 522, 107 So. 689.

744. Capias.

District Court of the United States

_____ District of _____

_____ Division

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the marshal for the _____ District of _____, Greeting:

You are hereby commanded that you apprehend _____ and him, on the _____ day of _____, 19____, have before the United States District Court for the _____ District of _____ at _____ to answer unto an _____ contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States of America.

Pursuant to statutes therefor provided, bail in the amount of _____ dollars (\$____) may be given in guaranty for the appearance of the aforesaid _____ at the time and place above stated. Failing therein, the aforesaid _____ is to stand committed to some common jail in this district, and the jailer thereof is hereby commanded to receive the body of the aforesaid _____ and him safely keep to be dealt with according to law.

Hereof you are not to fail at your peril, and have you then and there this writ.

Witness, the Honorable _____, United States district judge at _____ this _____ day of _____, 19____.

Clerk.By _____
Deputy clerk.

UNITED STATES MARSHAL'S RETURN

_____ District of _____

Received this writ the _____ day of _____, 19____, at _____ and executed same by arresting the defendant at _____, _____ miles _____ of _____ on the _____ day of _____, 19____.

Defendant was brought before _____, United States commissioner, at _____ and made bond as directed.

Defendant failed to make bond and was delivered to _____, Jailer of _____ County, on _____, 19____, with a copy hereof.

United States marshal.By _____
Deputy United States marshal.

Received the within writ the _____ day of _____, 19____, at _____ and returned unexecuted _____, 19____, on account of _____.

Marshal's fees

Arrest \$
 Committing defendant..... \$
 Discharge on bail..... \$
 Attendance before commissioner.... \$
 Expense:
 \$
 \$
 Mileage \$ \$

 TOTAL..... \$

 United States marshal.

By _____
 Deputy United States marshal.

Cross-References.

Bench warrant, Form 743.
 Warrant of arrest, Form 725.
 Warrant of removal, Form 742.
 See notes to Form 726.

Writ for removal of prisoner, 7 F. C. A., Title 18, § 604; U. S. C. A., Title 18, § 604; id. U. S. C.

Writ, several indictments against same person, 7 F. C. A., Title 18, § 602; U. S. C. A., Title 18, § 602; id. U. S. C.

Statutory References.

Writ as jailor's authority, 7 F. C. A., Title 18, § 603; U. S. C. A., Title 18, § 603; id. U. S. C.

Writ to bring prisoner into court, 7 F. C. A., Title 18, § 605; U. S. C. A., Title 18, § 605; id. U. S. C.

745. Recognizance.

District Court of the United States

_____ District of _____

_____ Division

The United States of America

v.

} U. S. Commissioner's No. ____
 } Criminal No. ____

Be it remembered, that on this ____ day of ____, 19____, before me, ____, Clerk of the United States District Court aforesaid, personally came

_____, residing at _____ Street,

City }
 County } of _____, state of _____ as principal,

and _____, residing at _____ Street,

City }
 County } of _____, state of _____,

_____, residing at _____ Street,

City }
 County } of _____, state of _____,

as suret—, and jointly and severally acknowledged themselves to owe to the United States of America the sum of — dollars (\$—), to be levied of their goods, chattels, lands, and tenements, to and for the use of the United States aforesaid, in case default be made in the condition of this recognizance, which is: That if the said — shall personally be and appear here in this court from day to day during the present term thereof, and from term to term of this court thereafter, then and there to answer to an — therein pending against — for violation of — and shall then and there abide the order and judgment of this court and not depart the court without leave thereof, then this recognizance to be void; otherwise to remain in full force and effect.

Taken and acknowledged before me this — day of —, 19—.

Clerk, United States district court.

By _____

Deputy clerk.

I, —, being duly sworn, depose and say that I am worth the sum of — dollars (\$—), over and above all my just debts and liabilities, in property subject to execution and sale, and that my property consists of —.

I further swear that I have not received, directly or indirectly, been promised, nor do I expect directly or indirectly, either indemnity, in whole or in part, or compensation in any amount as consideration for acting as surety herein. I further swear that I am not surety on other bonds in this or any other court, and before I make any change in the title of the property owned by me at the time of entering into this recognizance, I will advise the clerk of this court or the United States attorney, so that proper proceedings may be had releasing me as surety and for the substitution of another surety in my place and stead.

I further swear that I have not acquired the title to any of my real estate with any design or intention of making any deceptive or fraudulent showing of my sufficiency as bail in this behalf.

Subscribed and sworn to before me this — day of —, 19—.

Clerk, United States district court.

By _____

Deputy clerk.

[Here set out justification of remaining sureties in the same form as above.]

Statutory References.

Excessive bail may not be required, U. S. Const., Amend. 8.

See 7 F. C. A., Title 18, §§ 591 to 601; U. S. C. A., Title 18, §§ 591 to 601; id. U. S. C.

NOTES TO DECISIONS**Designation of Court or Offense.**

It is not essential to the validity of an appearance recognizance that it describe the particular offense for which it is taken. *Rheiner v. United States* (C. C. A. 5), 276 Fed. 803, affg. 266 Fed. 425; *United States v. Dennis* (C. C.-Ohio), Fed. Cas. No. 14949, 1 Bond 103; *United States v. George* (C. C.-Minn.), Fed. Cas. No. 15199, 3 Dill. 431.

Bond failing to state term of court or nature of charge, but indicating definite time and place for appearance, was valid. *Bickley v. United States* (C. C. A. 5), 24 Fed. (2d) 481.

Bail bond held to set forth a different offense from that described in the information. *National Surety Co. v. United States* (C. C. A. 9), 29 Fed. (2d) 92.

Bail bond reciting charge against accused and ending with expression "etc.," was valid. *United States v. Giacalone* (D. C.-N. Y.), 36 Fed. (2d) 252.

Recognizance fixing time as "January term, 1929, * * * at ten o'clock a. m. on the fifth day of Feb. A. D. 1929 and from day to day, etc.," was sufficiently explicit as to time for appearance of accused. *United States v. Smith* (D. C.-N. J.), 3 Fed. Supp. 498.

Recognizance stating that accused violated National Prohibition Act was sufficient without specifying particular offense thereunder. *United States v. Smith* (D. C.-N. Y.), 3 Fed. Supp. 498.

It is not necessary that a recognizance shall show that the offense is one against a statute of the United States. *United States v. De Grieff* (C. C.-N. Y.), Fed. Cas. No. 14935a.

Execution of Bond.

It is not necessary that parties sign a recognizance; an acknowledgment, certified by a justice of the peace, is all that

is required. *United States v. Picket* (D. C.-Ohio), Fed. Cas. No. 16043, 1 Bond 123.

Form and Sufficiency.

The form of a bail bond taken by a United States commissioner should conform in all substantial particulars to the requirements of the laws of the state in which the commissioner is sitting, so far as such laws are applicable. *United States v. Zarafonitis* (C. C. A. 5), 150 Fed. 97; *United States v. Buchanan* (D. C.-Tex.), 255 Fed. 915.

A mere clerical inaccuracy, resulting in no harm to any person at interest, ought not to be permitted to defeat the purpose of the law and the intentions of the parties to the bond. *Anduaga v. United States* (C. C. A. 5), 254 Fed. 61; *United States v. Smith* (D. C.-N. J.), 3 Fed. Supp. 498.

The bond need not state in what court the accused is to appear, since the law makes certain the court in which he is to be tried. *Moran v. United States* (C. C. A. 9), 10 Fed. (2d) 455.

Bail bond for an offender against the United States is sufficient though not literally following the wording of the state statute. *Bassett v. United States* (C. C. A. 9), 18 Fed. (2d) 856. Cert. den. 275 U. S. 548, 72 L. ed. 419, 48 Sup. Ct. 85.

Vague condition in bail bond may be rejected as surplusage. *Bickley v. United States* (C. C. A. 5), 24 Fed. (2d) 481.

Nothing in the state law can detract from the force and effect of the language of a bail bond however much it may apply to mode or form. *United States v. Payne* (D. C.-Wash.), 1 Fed. Supp. 895.

The material parts of the obligation and condition of a recognizance should be set forth in the body of it. *Dillingham v. United States* (C. C.-Pa.), Fed. Cas. No. 3913, 2 Wash. C. C. 422.

746. Bail Piece.

District Court of the United States

_____ District of _____

_____ Division

The United States of America

v.

Criminal No. _____

I hereby certify that on the _____ day of _____, 19____, a certain _____ came personally before _____ and being by the said _____ deemed good and sufficient, became bail and pledge in the sum of _____ dollars (\$_____), current money, that the said _____ should well and truly make his personal appearance before the United States District Court for the _____ District of _____, on _____, 19____, to answer a charge of unlawfully [Here insert] and attend the said court from day to day, and not depart thence without leave thereof.

And I further certify that the said _____ hath not been discharged from the recognizance aforesaid.

In testimony whereof, I hereunto subscribe my name and affix the seal of said District Court at _____, this _____ day of _____, 19____.

Clerk, United States district court.

By _____

Deputy clerk.

Cross-Reference.

See notes to Form 745.

747. Search Warrant.

United States of America, }
 _____ District of _____. } ss:

To _____ [here state official title] and to his agents and deputies or any of them.

Whereas, complaint on oath, and in writing, has this day been made before me _____, a United States commissioner for the said district, by _____, alleging that he has reason to believe and does believe that in and upon certain premises within the _____ District of _____, known as _____ and more particularly described as _____ there is located certain property used as a means of committing a felony, in violation of a law or laws of the United States, to wit: _____, said property consisting of _____;

And, whereas, I find from the facts stated in affidavits filed in support of the application for this search warrant that there is probable cause to believe that valid grounds exist for the issuance of said search warrant;

You are, therefore, hereby commanded to enter said premises during the daytime with the necessary and proper assistance and search the same for

all such property hereinbefore specified, to seize and take the same into your possession, and to report and act concerning the same as required of you by law.

Given under my hand, this — day of —, 19—.

United States commissioner.

Statutory References.

Penalty for unlawful search, 7 F. C. A., Title 18 § 53a; U. S. C. A., Title 18, § 53a; id. U. S. C.

Search warrant for animals or birds unlawfully possessed, 7 F. C. A., Title 18, § 393a; U. S. C. A., Title 18, § 393a; id. U. S. C.

Search warrant for counterfeit coins or securities or for counterfeiting implements, 7 F. C. A., Title 18, § 287; U. S. C. A., Title 18, § 287; id. U. S. C.

Search warrant for intoxicating liquor in Indian Territory, 5 F. C. A., Title 25, § 246; U. S. C. A., Title 25, § 246; id. U. S. C.

Search warrant for smuggled goods, 6A F. C. A., Title 19, § 1595; U. S. C. A., Title 19, § 1595; id. U. S. C.

See U. S. Const., Amend. 5.

See 7 F. C. A., Title 18, §§ 611 to 633; U. S. C. A., Title 18, §§ 611 to 633; id. U. S. C.

NOTES TO DECISIONS

Counterfeiting.

An affidavit for a search warrant under 7 F. C. A., Title 18, § 287; U. S. C. A., Title 18, § 287; id. U. S. C., based upon information that the defendant said he had counterfeit molds at his home, accompanied by oral evidence before the commissioner by the informant, is sufficient, taken in its entirety, in view of the fact that the section does not require an affidavit. *Sparks v. United States* (C. C. A. 6), 90 Fed. (2d) 61.

A search warrant may issue under 7 F. C. A., Title 18, § 287; U. S. C. A., Title 18, § 287; id. U. S. C. (counterfeiting), without an affidavit or testimony reduced to writing, but upon evidence sustained by proper oath or affirmation. *Sparks v. United States* (C. C. A. 6), 90 Fed. (2d) 61.

Description of Property or Person to Be Searched.

Warrant describing place as "garage located in the building" at a specified street number, and the liquor as "cases of whiskey," was sufficient to support search of entire building. *Steele v. United States*, 267 U. S. 498, 69 L. ed. 757, 45 Sup. Ct. 414.

It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended. *Steele v. United States*, 267 U. S. 498, 69 L. ed. 757, 45 Sup. Ct. 414; *Giacolone v. United*

States (C. C. A. 9), 13 Fed. (2d) 108; *Benton v. United States* (C. C. A. 4), 70 Fed. (2d) 24. Cert. den. 292 U. S. 642, 78 L. ed. 1494, 54 Sup. Ct. 778.

"John Doe" warrants are to be avoided. Where the name of the accused is known, it should be stated in the affidavit and search warrant. *United States v. Borkowski* (D. C.-Ohio), 268 Fed. 408.

If the place to be searched can be located definitely, it is sufficient; but the description as to ownership must be such as to identify certainly the place to be searched, otherwise the warrant is void. *United States v. Borkowski* (D. C.-Ohio), 268 Fed. 408.

A warrant to search a building described by a certain number, which is an apartment-house containing several families, is invalid, and it may not be amended by telephone to limit it to a certain apartment. *United States v. Mitchell* (D. C.-Cal.), 274 Fed. 128.

An affidavit and warrant, issued for the search of one defendant and one building, but not used, subsequently changed as to date, location of premises, and name of owner, was invalid. *United States v. Armstrong* (D. C.-Fla.), 275 Fed. 506.

A warrant which described the premises as at the corner of two streets, together with the city, county, and state, was insufficient. *United States v. Alexander* (D. C.-Fla.), 278 Fed. 308.

It is not necessary that the warrant name a particular person; the name of

the place to be searched is sufficient. *United States v. Camarota* (D. C.-Cal.), 278 Fed. 388.

Warrant which failed to describe sufficiently the property to be searched was invalid. *Giles v. United States* (C. C. A. 1), 284 Fed. 208.

A search under a warrant describing the premises by a street number is not invalidated because it is an apartment-house, the apartment searched being occupied by defendant. *United States v. Wihinier* (D. C.-Wash.), 284 Fed. 528.

If place described by street and number is used by a number of persons for different purposes, it is not a "place." *United States v. Innelli* (D. C.-Pa.), 286 Fed. 731.

Where intoxicating liquor was seized, and the defendant occupied the downstairs part of a dwelling described in the warrant, the fact that there were other tenants upstairs where nothing was seized, did not vitiate the search. *United States v. Lepper* (D. C.-N. Y.), 288 Fed. 136. Affd. 295 Fed. 1017.

A warrant to search premises indicated by an erroneous number, but served on the premises intended, and the person named was not the owner but an adult member of the family, was valid. *Rothlisberger v. United States* (C. C. A. 6), 289 Fed. 72.

If a place is to be searched, the warrant must describe and identify the place; if a person, the person must be identified; but for the searching of a place it is not necessary to name the owner or occupant. *Gandreau v. United States* (C. C. A. 1), 300 Fed. 21; *United States v. Leach* (D. C.-Del.), 24 Fed. (2d) 965; *United States v. Williams* (D. C.-Pa.), 43 Fed. (2d) 184; *United States v. Fitzmaurice* (C. C. A. 2), 45 Fed. (2d) 133.

Fact that warrant did not particularly describe any certain rooms in hotel to be searched is not fatal where affidavit stated that proprietor had liquor for sale, and warrant directed a search of the premises under his control. *Fry v. United States* (C. C. A. 9), 9 Fed. (2d) 38.

Search of premises at different street number than that stated in the warrant was illegal. *United States v. Sands* (D. C.-Wash.), 14 Fed. (2d) 670.

Where officers entered premises under a search warrant, and there found part of a still, they were authorized to arrest defendant who drove up in an automobile in which the missing parts of the still

were contained. *Colasurdo v. United States* (C. C. A. 9), 22 Fed. (2d) 934.

Description of place as a building although building was occupied by two tenants, when both used one entrance which was kept locked, was sufficient. *United States v. White* (D. C.-Nebr.), 29 Fed. (2d) 294.

Search warrant describing premises as a hotel was sufficient where the only rooms occupied were used by defendant for the unlawful sale of liquor. *Hogrefe v. United States* (C. C. A. 9), 30 Fed. (2d) 640.

Warrant describing particular premises does not authorize search of property across the street from the premises named, but the illegal search does not invalidate a search of the premises properly described. *Rising Sun Brew. Co. v. United States* (C. C. A. 3), 55 Fed. (2d) 827.

Search warrant describing property as "The Humidor" at a specified street number supported a search of entire four-story building, though lower floor was a cigar store and billiard room owned by defendant, entrance to upper floors being through billiard room. *Irwin v. United States*, 67 App. D. C. 41, 89 Fed. (2d) 678.

Description of Property to be Seized.

A warrant for the search for cases of whiskey justifies seizure of whisky in cases, bottles, bags, jugs, and barrels. *Steele v. United States*, 267 U. S. 498, 69 L. ed. 757, 45 Sup. Ct. 414.

The requirements that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *Marron v. United States*, 275 U. S. 192, 72 L. ed. 231, 48 Sup. Ct. 74, affg. (C. C. A. 9), 18 Fed. (2d) 218.

Books and papers not described in the warrant can not be seized except as an incident to a lawful arrest. *Marron v. United States*, 275 U. S. 192, 72 L. ed. 231, 48 Sup. Ct. 74, affg. (C. C. A. 9), 18 Fed. (2d) 218.

A defendant is entitled to the return of a letter seized on search, where the warrant did not embrace any papers or documents. *United States v. Hill* (D. C.-Ohio), 263 Fed. 812.

Checks not described or mentioned in an affidavit are unlawfully seized under a warrant for search for stolen merchandise. *Honeycutt v. United States* (C. C. A. 4), 277 Fed. 939.

Under a warrant for seizure of 450 gallons of liquor, officers are not authorized to seize 7,000 gallons. *Keefe v. Clark* (D. C.-Mass.), 287 Fed. 372.

In maintaining constitutional protection to an individual's property, it is more important to require a specific description in a search warrant of books, records, and papers, which are usually of value only to the owner, and can not be replaced, than of tangible property of intrinsic value. *Lipschutz v. Davis* (D. C.-Pa.), 288 Fed. 974.

A warrant describing 10 or 12 barrels of whisky and authorizing their seizure is limited to the barrels described, but the officer may, after lawful entry, seize other liquors which he finds, under the Search Warrant Act. *United States v. Old Dominion Ware House* (C. C. A. 2), 10 Fed. (2d) 736.

Under a warrant for search for liquor, the container thereof, and property designed for the manufacture of liquor, seizure indiscriminately of incriminatory documents is not warranted. *United States v. Kirschenblatt* (C. C. A. 2), 16 Fed. (2d) 202, 51 A. L. R. 416; *United States v. Kirsch* (C. C. A. 2), 16 Fed. (2d) 204.

A warrant for a search in a building other than a dwelling for "certain intoxicating liquor, containers for the same, and property used in the manufacture of intoxicating liquor" satisfied both the constitution and the law. *United States v. Kaplan* (D. C.-Mass.), 16 Fed. (2d) 802.

A warrant for search for liquors and containers and property is not broad enough to include the seizure of books and papers by forcible entry into a safe several days after the execution of the warrant. *United States v. Spallino* (D. C.-N. Y.), 21 Fed. (2d) 567.

Warrant must so describe the articles to be seized that the officer has no function except identification of the articles described. If the officer is given a discretion as to the articles that he will take, a description is insufficient. *United States v. Smith* (D. C.-R. I.), 23 Fed. (2d) 929.

Books and papers can not be seized unless they are described in the warrant. *United States v. Hertel Athletic & Social Club* (D. C.-N. Y.), 25 Fed. (2d) 872.

The search warrant need not specify the particular liquor which is to be seized where the stock kept on hand is a shifting one. *United States v. Fitzmaurice* (C. C. A. 2), 45 Fed. (2d) 133.

A search warrant directing the seizure of specified intoxicating liquor and articles used in the manufacture thereof did not authorize the seizure of a truck. *Marggraf v. Lewis* (C. C. A. 1), 54 Fed. (2d) 54, revg. 45 Fed. (2d) 247.

While technical precision in the description of the property to be seized is not required, there should be such particularity and certainty as will prevent the warrant from being a roving commission. *United States v. Quantity of Extracts* (D. C.-Fla.), 54 Fed. (2d) 643.

Essentials of Warrant.

Otherwise sufficient warrant for search and seizure of property possessed in violation of Volstead Act was not fatally defective for merely directing due return of the warrant, instead of directing property to be brought before judge or commissioner. *Petition of Barber* (D. C.-Mich.), 281 Fed. 550.

The warrant should be full and complete in itself. It should contain the name or description of the person whose premises are to be searched, a particular description of the property to be sought and of the place to be searched. It should state the particular ground or probable cause for its issue, and the names of persons whose names have been taken in support thereof. It should direct that it be served in the daytime unless the affidavits show reasons for other service, and should direct that it be executed and returned to the judge or commissioner who issued it within 10 days after its date. *United States v. Kaplan* (D. C.-Ga.), 286 Fed. 963.

The directions in the warrant must strictly comply with the statute. *United States v. Dziadus* (D. C.-W. Va.), 289 Fed. 837.

Literal direction to bring property seized before the proper official is not jurisdictional. *United States v. Edwards* (D. C.-Mich.), 296 Fed. 512.

Search warrant signed by judge was sufficient though name of United States commissioner was printed at top of paper. *Tucker v. United States* (C. C. A. 7), 299 Fed. 235.

A search warrant issued by a commissioner need not be attested in the name of the president. *Gray v. United States* (C. C. A. 9), 9 Fed. (2d) 337.

Captions or directions are essential parts of warrant. *United States v. Nestori* (D. C.-Cal.), 10 Fed. (2d) 570.

Where search warrant expressly authorized an unlawful seizure, as seizure of property affixed to real estate, it was invalid. *United States v. 63,250 Gallons of Beer* (D. C.-Mass.), 13 Fed. (2d) 242.

Insertion in warrant of words "to the end that the said property may be thereafter dealt with according to law" after directing clause was not a jurisdictional defect. *United States v. Murray* (D. C.-Cal.), 17 Fed. (2d) 276.

Omission of date does not invalidate warrant. *United States v. Hertel Athletic & Social Club* (D. C.-N. Y.), 25 Fed. (2d) 872.

A search warrant issued on Sunday is not invalid. *United States v. Harbin* (D. C.-Miss.), 27 Fed. (2d) 892.

The statement in the warrant of a fact not found in the affidavit, but not amounting to the substitution of a different ground, does not invalidate the warrant, it not being necessary to copy the affidavit into the warrant. *Schroeder v. United States* (C. C. A. 5), 53 Fed. (2d) 6.

The fact that 14 days elapsed between the time the liquor was purchased and the date the warrant was issued did not to invalidate the warrant under the circumstances of the particular case. *United States v. Liebrich* (D. C.-Pa.), 55 Fed. (2d) 341.

Mention in the warrant of a statute which does not fit the case, or unnecessary words not affecting the rights of the person against whom it is executed, may be rejected as surplusage. *Hysler v. United States* (C. C. A. 5), 86 Fed. (2d) 918.

Warrant need not direct that person be arrested. *Barnett v. Commonwealth*, 207 Ky. 160, 268 S. W. 1084.

Execution and Return of Warrant.

Where there was no foundation laid in the affidavit upon which a search warrant was issued, justifying insertion in the warrant of a direction to serve same either in the daytime or night, a warrant directing such service either in daytime or night, and a seizure of property thereunder actually made in the nighttime, was void. *United States v. Yuck Kee* (D. C.-Minn.), 281 Fed. 228.

A search and seizure in the nighttime where the warrant does not in terms contain a direction that it may be served at any time of the day or night are illegal, and when there is no positive proof that the property is on the person or in place to be searched, issuance of a warrant to

search at night is illegal. *United States v. Kaplan* (D. C.-Ga.), 286 Fed. 963.

The officer mentioned in the directions of the warrant must have specific directions as to what he shall do under it. *United States v. Dziadus* (D. C.-W. Va.), 289 Fed. 837.

A warrant issued on the faith of an affidavit stating positively that the goods to be seized are on the premises, authorizing a search day or night, need not contain a recital of the positive statement of the affidavit. *Gandreau v. United States* (C. C. A. 1), 300 Fed. 21.

A warrant sufficient on its face for the purpose, justifies the search of premises in the nighttime, even though the direction for such search was not authorized. *Gandreau v. United States* (C. C. A. 1), 300 Fed. 21.

Direction in warrant to make report "as provided by law," was sufficient as regards time of return. *Fry v. United States* (C. C. A. 9), 9 Fed. (2d) 38.

The absence of a literal direction to seize and bring before the proper official the property described is a mere irregularity in form only, and not a jurisdictional defect which renders the proceedings void. *United States v. Murray* (D. C.-Cal.), 17 Fed. (2d) 276, citing *Petition of Barber* (D. C.-Mich.), 281 Fed. 550, and *United States v. Edwards* (D. C.-Mich.), 296 Fed. 512.

Return need not contain copy of detailed receipt given by the officer for the goods seized. *United States v. Williams* (D. C.-Pa.), 43 Fed. (2d) 184.

Where search and seizure was otherwise valid, a minor mistake in the copy of the warrant delivered by the officer to defendant was immaterial. *Johnson v. United States* (C. C. A. 6), 46 Fed. (2d) 7.

It is not necessary to incorporate time for return in the warrant. *Benton v. United States* (C. C. A. 4), 70 Fed. (2d) 24. *Cert. den.* 292 U. S. 642, 78 L. ed. 1494, 54 Sup. Ct. 778.

Failure of marshal to make return on warrant within ten days was not fatal as such a return is a ministerial act and can be made within a reasonable time. *Retich v. United States* (C. C. A. 1), 84 Fed. (2d) 118.

Under 7 F. C. A. Title 18, § 620; U. S. C. A., Title 18, § 620; id. U. S. C., there must be some direction as to the time when the warrant may be served, and though the affidavit be positive that the property is on the person or in a place to be searched, nevertheless there must be

a direction that a warrant be served "at any time of the day or night." *State v. Morley* (N. J.), 139 Atl. 392.

Officer to Whom Directed.

Warrant addressed to "any peace officer" of a named county and state was insufficient to render evidence obtained thereunder, admissible in the federal court, federal officers having joined in and participated in the search as federal officers. *Byars v. United States*, 273 U. S. 28, 71 L. ed. 520, 47 Sup. Ct. 248, revg. (C. C. A. 8), 4 Fed. (2d) 507.

The better practice is for the commissioner to make a selection of qualified officers to serve the warrant and to designate them by mentioning them by name, and no persons, other than those named, should execute the writ otherwise than in accordance with 7 F. C. A., Title 18, § 617; U. S. C. A., Title 18, § 617; id. U. S. C. United States v. Innelli (D. C.-Pa.), 286 Fed. 731.

A prohibition agent, appointed by the commissioner of Internal Revenue was a "civil officer" within the meaning of 7 F. C. A., Title 18, § 616; U. S. C. A., Title 18, § 616; id. U. S. C. United States v. Keller (D. C.-Mich.), 288 Fed. 204; United States v. Syrek (D. C.-Mass.), 290 Fed. 820; United States v. American Brew. Co. (D. C.-Pa.), 296 Fed. 772; United States v. Loeffelman (D. C.-Minn.), 297 Fed. 472; United States v. Montalbano (D. C.-Tex.), 298 Fed. 667; Raine v. United States (C. C. A. 9), 299 Fed. 407. Cert. den. 266 U. S. 611, 69 L. ed. 467, 45 Sup. Ct. 94; Dovel v. United States (C. C. A. 7), 299 Fed. 948; Daeuffer-Lieberman Brew Co. v. United States (C. C. A. 3), 8 Fed. (2d) 1. Contra, United States v. Musgrave (D. C.-Nebr.), 293 Fed. 203.

The return of a warrant by a person other than the one to whom it is directed is insufficient. *United States v. Dziadus* (D. C.-W. Va.), 289 Fed. 837.

It is not necessary that a warrant be directed to a particular officer by name. *Gandreau v. United States* (C. C. A. 1), 300 Fed. 21; United States v. Smith (D. C.-Fla.), 16 Fed. (2d) 788.

A search and seizure by person other than the one to whom warrant was directed, or of class to whom directed, or in their presence, was invalid. *Leonard v. United States* (C. C. A. 1), 6 Fed. (2d) 353.

Search warrant directed "to internal revenue officer of the U. S." was insufficient. *United States v. Kordos* (D. C.-Pa.), 13 Fed. (2d) 905.

The warrant must show on its face the officer to whom it is addressed, and while his name need not appear, and it may be directed to a class of officers; a direction "to _____ Federal Prohibition Agent and his deputies or any or either of them" was insufficient. *United States v. Smith* (D. C.-Fla.), 16 Fed. (2d) 788.

A warrant directed to a class of officers was insufficient. *United States v. Kohlman* (D. C.-Pa.), 51 Fed. (2d) 313.

An internal revenue search warrant issued by a United States commissioner under 7 F. C. A., Title 18, § 616; U. S. C. A., Title 18, § 616; id. U. S. C., addressed to an investigator of the Alcohol Taxing Unit, as a civil officer of the United States, and to his agents or deputies, was not fatally defective. *Hysler v. United States* (C. C. A. 5), 86 Fed. (2d) 918.

Statement of Grounds of Issue.

Where affidavits do not set forth facts tending to establish grounds for probable cause, a warrant issued thereon is without lawful foundation. *Grau v. United States*, 287 U. S. 124, 77 L. ed. 212, 53 Sup. Ct. 38, revg. (C. C. A. 6), 56 Fed. (2d) 779.

The satisfaction of the officer may be presumed from the fact of issuance, and need not be recited in the warrant. *Tucker v. United States* (C. C. A. 7), 299 Fed. 235.

If an affidavit does not meet the requirements which the Constitution requires, no assertion or statement by the magistrate in the warrant that he found probable cause would legalize the warrant. *Hawker v. Queck* (C. C. A. 3), 1 Fed. (2d) 77. Cert. den. 266 U. S. 621, 69 L. ed. 472, 45 Sup. Ct. 99.

Search warrant reciting affidavit of named person was insufficient, though other affidavits were considered, where the affidavit named was insufficient to satisfy the law. *Kohler v. United States* (C. C. A. 9), 9 Fed. (2d) 23.

The warrant need not expressly state that the judicial officer issuing it found that there was probable cause, it being sufficient that it commands a search. *Schroeder v. United States* (C. C. A. 5), 53 Fed. (2d) 6.

748. Motion to Quash Search Warrant.

(Caption.)

To _____, Esquire,

United States attorney.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — to quash the search warrant issued herein on — —, 19—, for the search of defendant's premises at —, and direct the return to defendant of the evidence obtained thereunder on the following grounds:

1. That it was issued without probable cause.
2. That the affidavit on which the warrant was issued was made on information and belief and does not sufficiently set forth the sources of affiant's information or the grounds of his belief.
3. That the warrant does not sufficiently describe the premises to be searched.
4. That the warrant does not sufficiently describe the property to be seized.
5. That the facts set forth as probable cause in said warrant were unlawfully obtained.
6. That the facts upon which probable cause is predicated were obtained by an unlawful search of defendant's premises.

The said evidence is the property of defendant and he is entitled to its possession.

Attorney for defendant.

Address.

Date—.

Cross-Reference.

In connection with Forms 748, 749, see notes to Form 747.

749. Motion to Suppress Evidence.

(Caption.)

To _____

United States attorney for
the — District of —.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — for an order directing that all of the property consisting of — which was seized by — at —, be excluded as evidence upon the trial of this cause and that it be suppressed and returned to defendant on the ground that:

1. Said property was obtained by an unlawful search and seizure in that same was made without a search warrant.

2. Said property was seized during a search made pursuant to a search warrant, but said property was not named or described in said warrant.

The said property belongs to defendant and he is entitled to its possession.

Attorney for defendant.

Address.

Date_____.

Statutory Reference.

See 7 F. C. A., Title 18, § 626; U. S. C. A., Title 18, § 626; id. U. S. C.

NOTES TO DECISIONS

In General.

Court can not summarily order return of articles seized where no libel has been filed and the articles are not under the control of the court, the remedy being by a plenary action. *In re Allen* (D. C.-Pa.), 1 Fed. (2d) 1020.

The remedy in case of seizure without warrant is mandamus to compel institution of libel of condemnation, not by motion for order directing delivery of the property to claimant. *In re Troy Pure Food Products Co.* (D. C.-N. Y.), 14 Fed. (2d) 677.

Petition for suppression of liquor as evidence would not lie after dismissal of the information, where there had been no seizure of the liquors under search warrant or other judicial process. *Applybe v. United States* (C. C. A. 9), 32 Fed. (2d) 873. *Reh. den.* 33 Fed. (2d) 897. *Cert. den.* 280 U. S. 594, 74 L. ed. 641, 50 Sup. Ct. 39.

Court may entertain petition for return of articles seized, though no civil or criminal proceedings have been taken against accused. *In re Herter* (C. C. A. 9), 33 Fed. (2d) 400, *affg.* 30 Fed. (2d) 968.

A bill in equity will not lie to secure return of the seized liquor and to prevent its destruction, in view of 8 F. C. A., Title 28, § 747; U. S. C. A., Title 28, § 747; id. U. S. C., and for the reason that the remedy to compel the institution of forfeiture proceedings, in which the proper defense may be interposed, is adequate. *Rothman v. Campbell* (D. C.-N. Y.), 54 Fed. (2d) 103.

Essential Allegations.

Motion to suppress evidence and secure return of document seized was insufficient in failing to allege that the property seized belongs to movant, and that he is entitled to its possession. *Shields v. United States*, 58 App. D. C. 215, 26 Fed. (2d) 993. *Cert. den.* 278 U. S. 633, 73 L. ed. 550, 49 Sup. Ct. 31.

Affidavits must be self-sufficient. *United States v. Casino* (D. C.-N. Y.), 286 Fed. 976.

A defendant wishing to challenge the legality of a search and seizure must make his motion on papers which are prima facie adequate to displace the presumption of a legal seizure. *United States v. Goble* (D. C.-N. Y.), 44 Fed. (2d) 224.

Petitions for suppression of evidence seized in the search of a brewery showing that one petitioner was a watchman on the premises, and another petitioner was arrested on the premises, but not alleging ownership did not show that petitioners were aggrieved by the seizure. *Connolly v. Medalie* (C. C. A. 2), 58 Fed. (2d) 629.

Where it appears from affidavits of defendants that they do not claim any proprietary interest in property seized, motion for suppression of evidence and return of property was denied. *In re Porto* (D. C.-N. Y.), 20 Fed. Supp. 950.

Petition praying for return of papers seized, but without prayer for suppression of the evidence, was sufficient. *Gorman v. State*, 161 Md. 700, 158 Atl. 903.

Time for Motion.

Motion to suppress evidence obtained by illegal search may be made after the jury is sworn, but application to amend motion near the close of the government's evidence was in the discretion of the court. *Samson v. United States* (C. C. A. 1), 26 Fed. (2d) 769.

Motion made during progress of trial to suppress evidence obtained by search

and seizure was too late. *Patterson v. United States* (C. C. A. 9), 31 Fed. (2d) 737.

Where defendant has knowledge that evidence submitted by the prosecution was procured by unlawful search, he should move to suppress the evidence before the trial begins. *Durkin v. United States* (C. C. A. 1), 62 Fed. (2d) 305.

750. Order Suppressing Evidence.

(Caption.)

This cause was heard on motion of — defendant herein for an order suppressing certain evidence belonging to said defendant which was seized on — —, 19—, by —, at —, and it appearing to the court that said property was obtained by an unlawful search and seizure in that — it is

Ordered, that the property consisting of — be and it is hereby suppressed and excluded as evidence upon the trial of this cause, and that the same be returned to defendant.

Date—.

United States district judge.

Cross-Reference.

See notes to Forms 747, 749.

751. Plea in Abatement.

(Caption.)

Now comes John Doe, defendant in this action, and after hearing the indictment herein read, says that the United States should not further prosecute the said indictment against him and that the same should abate, for the following reasons:

1. That AB and CD, members of the grand jury which returned the indictment herein, were not qualified to serve as such grand jurors, for the reason that —.

2. That John Doe, who is indicted by the name of Jasper Roe, alias Jack Moe, was baptized and has ever since been called and known by the name of John Doe, and has never been called or known by the name of Jasper Roe or Jack Moe.

3. That unauthorized persons, to wit, AB and CD, were present in the grand jury-room while the grand jury was in session and hearing testimony in the proceeding in which this indictment was found.

Wherefore, he prays that this indictment be abated, and that he be discharged from custody.

Attorney for defendant.

Statutory References.

Indictment not insufficient for imperfection of form or because of appearance of clerical assistants before grand jury, 7 F. C. A., Title 18, § 556; U. S. C. A., Title 18, § 556; id. U. S. C.

Time for entering plea, 7 F. C. A., Title 18, § 556a; U. S. C. A., Title 18, § 556a; id. U. S. C.

When presence of unqualified persons on grand jury abates the indictment, 7 F. C. A., Title 18, § 554a; U. S. C. A., Title 18, § 554a, id. U. S. C.

NOTES TO DECISIONS**In General.**

Where indictment charges a continuing conspiracy and that it continued to date of filing, that allegation must be denied under the general issue to show the operation of the statute of limitations and not by a special plea. *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. 124.

Where the indictment for an offense against the United States does not show upon its face that the defendants are not within the exception created by a section of the statute, the defendants can not, by demurrer, avail themselves of the bar of limitations, but by a special plea in abatement. *United States v. Brace* (D. C. Cal.), 143 Fed. 703.

752. Motion to Quash Indictment Charging Conspiracy.**(Caption.)**

And now comes the defendant, —, and says that the indictment herein is not sufficient in law to require the defendant to plead thereto, and moves the court to quash the indictment for the reason that indictments No. —, No. —, No. —, and No. —, allege that there were four separate conspiracies as hereinbefore shown in the motion to quash indictment No. — filed simultaneously herewith, and if this indictment No. —, may be read as alleging one continuing conspiracy commencing —, and continuing until —, then it has joined separate conspiracies heretofore pleaded in the first mentioned four indictments and is void.

Wherefore, this defendant demands judgment dismissing this indictment and discharging him from custody.

Defendant.

(Verification.)**Statutory References.**

Indictment not insufficient for imperfection of form or because of appearance of clerical assistants before grand jury. 7 F. C. A., Title 18, § 556; U. S. C. A., Title 18, § 556; id. U. S. C.

Joinder of charges, 7 F. C. A., Title 18, § 557; U. S. C. A., Title 18, § 557; id. U. S. C.

Time for motion, 7 F. C. A., Title 18, § 556a; U. S. C. A., Title 18, § 556a; id. U. S. C.

When presence of unqualified persons on grand jury is grounds to quash indictment, 7 F. C. A., Title 18, § 554a; U. S. C. A., Title 18, § 554a; id. U. S. C.

NOTES TO DECISIONS**In General.**

Defendant can not, by demurrer set up the statute of limitations as a defense, where the act defining the offense con-

tains neither an exception nor a proviso of any kind. *United States v. Cook*, 17 Wall. (84 U. S.) 168, 21 L. ed. 538,

Motion to quash is proper if it clearly appears that, as a matter of law, there can be no conviction. *United States v. Clavin* (D. C.-N. Y.), 272 Fed. 985.

A motion to quash can not be considered as the equivalent of a demurrer. *Johnson v. United States* (C. C. A. 9),

59 Fed. (2d) 42. Cert. den. 287 U. S. 631, 77 L. ed. 547, 53 Sup. Ct. 83.

Motion to quash will not lie unless objection appears on face of indictment. *United States v. Brown* (D. C.-Ore.), Fed. Cas. No. 14671, 1 Sawy. 531.

753. Motion to Quash Indictment on Various Grounds.

(Caption.)

To _____, Esquire,
United States attorney.

Please take notice that on _____, 19____, at _____ M., or as soon thereafter as counsel can be heard, defendant will move this court at _____ for an order quashing the indictment herein and each and every count thereof, on the following grounds:

1. Said indictment is uncertain, vague, and indefinite, and does not with sufficient particularity set forth facts constituting any offense known to the law, in that _____.

2. The acts alleged in said indictment to have been committed by defendant are not set forth with sufficient particularity to inform defendant of the crime charged against him, in that _____.

3. The said indictment was found by the grand jury upon evidence submitted to it which was incompetent and improper, to wit, solely upon testimony of defendant's wife, who appeared before said grand jury and testified without defendant's consent, said witness not being the victim of the alleged offense.

4. It appears on the face of said indictment that this court has no jurisdiction of the offense therein attempted to be set forth, in that the acts therein described do not constitute an offense against the United States unless committed in a place within the exclusive jurisdiction of the United States and the place in which said acts are claimed to have been committed is not within the exclusive jurisdiction of the United States.

5. It appears on the face of said indictment that this court has no jurisdiction of the offense therein attempted to be set forth, in that the place wherein it is claimed to have been committed is not in the district of _____.

6. That unauthorized persons, to wit, AB, and CD, were present in the grand jury room while the grand jury was in session and hearing testimony in the proceeding in which this indictment was found.

Attorney for defendant.

Address.

Cross-Reference.

In connection with Forms 753 to 755,
see notes to Form 752.

754. Motion to Quash Indictment Charging Perjury.

(Caption.)

Comes now the defendant, AB, and moves the honorable court herein for its order quashing the indictment herein upon the following grounds and for the following reasons, to wit:

1. That said indictment fails to state facts sufficient to constitute an offense under U. S. C., Title 18, section 231:

(a) That the Securities and Exchange Commission, before which the act of perjury is alleged to have been committed, is not a lawfully constituted body, the act purporting to create the same, to wit, the Securities Exchange Act of 1934 (U. S. C., Title 15, sections 78a to 78jj) being unconstitutional;

(b) That said indictment fails to set forth the nature of the certain investigation referred to therein held on the 18th and 20th day of July, 1936, before the Securities and Exchange Commission, and fails to show that such investigation was within the jurisdiction, if any, of the said Securities and Exchange Commission;

(c) That said indictment fails to disclose the particular office held by CD, who is alleged to have administered the oath alleged to have been administered in said indictment.

2. That said indictment is uncertain in the following particulars:

(a) That said indictment fails to disclose and it can not be ascertained therefrom whether or not the purported oath was administered on the 18th day of July, 1936, or on the 20th day of July, 1936;

(b) That the said indictment fails to disclose and it can not be ascertained therefrom whether the testimony complained of by the indictment herein was given on the 18th day of July, 1936, or on the 20th day of July, 1936, or on both such days; and if on both said days, what portion was given on the 18th day of July, 1936, and what portion on the 20th day of July, 1936;

(c) That the said indictment fails to disclose and it can not be ascertained therefrom what the nature of the investigation was before the said Securities and Exchange Commission, what pertinency thereto the questions asked had, how or in what manner such questions could be material to any issue before said commission;

(d) That said indictment fails to disclose and it can not be ascertained therefrom how, or in what manner, it could be material to the Securities and Exchange Commission, whether or not the defendant did organize and/or did incorporate, and/or did operate said — Oil Corporation; and wherein, or how, or in what manner it could be material to said investigation whether or not defendant caused the organization, and/or the incorporation, and/or the operation of said corporation, and/or whether he had anything to

do with said corporation, and/or whether he had any connection with said corporation;

(e) That said indictment fails to disclose and it can not be ascertained therefrom how, or in what manner, it was material to said investigation of the said Securities and Exchange Commission whether or not defendant requested one, EF, to become an incorporator and/or director and/or officer of said — Oil Corporation, and/or to transfer to said corporation certain properties in which this defendant had a beneficial interest;

(f) That said indictment fails to disclose and it can not be ascertained therefrom how, or in what manner it was material to the investigation before said Securities and Exchange Commission whether or not defendant herein was authorized to and/or did sign checks and/or drafts and/or other documents for or in behalf of said — Oil Corporation;

(g) That said indictment fails to disclose and it can not be ascertained therefrom whether the purported statement of the defendant "that he had nothing to do with said corporation and that he had no connection with said corporation" referred to the time at which the question was put to him, or whether it referred to some other or prior time; in other words, whether he had at that time anything to do with said corporation and/or in connection with said corporation, or whether he had had anything to do with said corporation and/or had had any connection with said corporation;

(h) That said indictment fails to disclose and it can not be ascertained therefrom whether said purported averments of the defendant, to wit: "that he did not organize, incorporate or operate said corporation, or cause it to be organized, incorporated, or operated; and that he had nothing to do with said corporation, and that he had no connection with said corporation" was used in the conjunctive or disjunctive sense as to said series of allegations;

(i) That it fails to appear and can not be ascertained therefrom whether the defendant herein actually did organize and/or incorporate and/or operate said — Oil Corporation, the allegations of truth in respect thereto going only to the allegation that the defendant caused said — Oil Corporation to be organized and incorporated and operated;

(j) That said indictment fails to disclose and it can not be ascertained therefrom how the truth of the alleged fact that the defendant participated in the operation of the said corporation has any bearing on the fact or the question as to whether or not defendant testified that he had not operated said corporation.

3. That said indictment is unintelligible for the reasons that it is uncertain;

4. That said indictment is ambiguous for the reasons that it is uncertain and unintelligible;

5. That said indictment improperly fails to set forth separately various counts of alleged perjury;

6. That several allegations of perjury have been improperly joined without being separately stated.

Respectfully submitted,

Attorney for defendant.

I, —, hereby certify that I have examined the indictment herein and investigated the law applicable thereto, and that, in my opinion the within motion is well taken; that the same is filed in good faith and not for the purpose of delay.

Date—.

Attorney for defendant.

Source of Form.

Adapted from record in Woolley v.
United States, 305 U. S. 614, 83 L. ed.
391, 59 Sup. Ct. 73.

755. Order Quashing Indictment.

(Caption.)

This cause came on for hearing on defendant's motion to quash the indictment herein, on the ground that it appears on the face of said indictment that this court has no jurisdiction of the offense attempted to be set forth therein and after hearing —, attorney for defendant, in support of said motion, and —, United States attorney for the — District of —, in opposition thereto, and it appearing that said indictment charges defendant with having committed the offense described therein at —, which is not in this judicial district, and the court being fully advised, it is

Ordered, that the said motion to quash the indictment herein be and it is hereby granted, and said indictment is hereby quashed; and it is further

Ordered, that the defendant be and he is hereby discharged from custody and — is hereby directed to release the defendant.

Date—.

United States district judge.

756. Demurrer.

(Caption.)

The defendant, —, demurs to the indictment presented by the grand jury, on — —, 19—, charging him with —, on the following grounds:

First. That more than one crime is charged in the indictment.

Second. That the facts stated in said indictment do not constitute a crime.

Wherefore, this defendant asks judgment of the court that he be dismissed and discharged from said premises specified in the said indictment.

Date——.

Respectfully submitted,

Attorney for defendant.

To——

Address.

United States attorney.

Statutory References.

Indictment not insufficient for imperfection of form or because of appearance of clerical assistants before grand jury,

7 F. C. A., Title 18, § 556; U. S. C. A., Title 18, § 556; id. U. S. C.

Joinder of charges, 7 F. C. A., Title 18, § 557, 7 F. C. A., Title 18, § 557; id U. S. C.

NOTES TO DECISIONS

In General.

Where the indictment for an offense against the United States does not show upon its face that the defendants are not within the exception created by a section of the statute, the defendants can not, by demurrer, avail themselves of the bar of limitations, but by a special plea in abatement. *United States v. Brace* (D. C.-Cal.), 143 Fed. 703.

Demurrer and not motion in arrest of judgment is the proper method of questioning the sufficiency of the indictment. *Clement v. United States* (C. C. A. 8), 149 Fed. 305. Cert. den. 206 U. S. 562, 51 L. ed. 1189, 27 Sup. Ct. 795.

The defense of the statute of limitations can not be made by demurrer. *Greene v. United States* (C. C. A. 5), 154 Fed. 401. Cert. den. 207 U. S. 596, 52 L. ed. 357, 28 Sup. Ct. 261; *United States v. Andem* (D. C.-N. J.), 158 Fed. 996; *Hedderly v. United States* (C. C. A. 9), 193 Fed. 561.

Demurrer presenting naked list of authorities, without argument or written points was improper. *United States v. Reece* (D. C.-Idaho), 280 Fed. 913.

The defendant may avail himself of the statute of limitations by demurrer. *United States v. Watkins*, Fed. Cas. No. 16649, 3 Cranch C. C. 441; *United States v. White*, Fed. Cas. No. 16678, 5 Cranch C. C. 368.

757. Demurrer to Indictment Charging Perjury.

(Title of Court and Cause.)

Comes, now, the defendant, AB, and demurs to the indictment herein, and for grounds of demurrer alleges:

1. That said indictment fails to state facts sufficient to constitute an offense under U. S. C., Title 18, section 231:

(a) That the Securities and Exchange Commission, before which the act of perjury is alleged to have been committed, is not a lawfully constituted body, the act purporting to create the same, to wit, the Securities Exchange Act of 1934 (U. S. C., Title 15, section 78a to 78jj), being unconstitutional;

(b) That said indictment fails to set forth the nature of the certain investigation referred to therein held on the 18th and 20th days of July,

1936, before the Securities and Exchange Commission, and fails to show that such investigation was within the jurisdiction, if any of the said Securities and Exchange Commission;

(c) That said indictment fails to disclose the particular office held by CD, who is alleged to have administered the oath alleged to have been administered in said indictment.

2. That said indictment is uncertain in the following particulars:

(a) That said indictment fails to disclose and it can not be ascertained therefrom whether or not the purported oath was administered on the 18th day of July, 1936, and on the 20th day of July, 1936;

(b) That the said indictment fails to disclose and it can not be ascertained therefrom whether the testimony complained of by the indictment herein was given on the 18th day of July, 1936, or on the 20th day of July, 1936, on or both such days; and if on both said days, what portion was given on the 18th day of July, 1936, and what portion on the 20th day of July, 1936;

(c) That the said indictment fails to disclose and it can not be ascertained therefrom what the nature of the investigation was before the said Securities and Exchange Commission, what pertinency thereto the questions asked had, how or in what manner such questions could be material to any issue before said commission;

(d) That said indictment fails to disclose and it can not be ascertained therefrom how, or in what manner, it could be material to the Securities and Exchange Commission, whether or not the defendant did organize and/or did incorporate, and/or did operate said — Oil Corporation; and wherein, or how, or in what manner it could be material to said investigation whether or not defendant caused the organization, and/or the incorporation, and/or the operation of said corporation, and/or whether he had anything to do with said corporation, and/or whether he had any connection with said corporation;

(e) That said indictment fails to disclose and it can not be ascertained therefrom how, or in what manner, it was material to said investigation of the said Securities and Exchange Commission whether or not defendant requested one, EF, to become an incorporator and/or director and/or officer of said — Oil Corporation, and/or to transfer to said corporation certain properties in which this defendant had a beneficial interest;

(f) That said indictment fails to disclose and it can not be ascertained therefrom how, or in what manner it was material to the investigation before said Securities and Exchange Commission whether or not defendant herein was authorized to and/or did sign checks and/or drafts and/or other documents for or in behalf of said — Oil Corporation;

(g) That said indictment fails to disclose and it can not be ascertained therefrom whether the purported statement of the defendant "that he had nothing to do with said corporation and that he had no connection with said corporation" referred to the time at which the question was put to him, or whether it referred to some other or prior time; in other words,

whether he had at that time anything to do with said corporation and/or in connection with said corporation, or whether he had had anything to do with said corporation and/or had had any connection with said corporation.

(h) That said indictment fails to disclose and it can not be ascertained therefrom whether said purported averments of the defendant, to wit: "That he did not organize, incorporate, or operate said corporation, or cause it to be organized, incorporated, or operated; and that he had nothing to do with said corporation, and that he had no connection with said corporation," was used in the conjunctive or the disjunctive sense as to said series of allegations;

(i) That it fails to appear and can not be ascertained therefrom whether the defendant herein actually did organize and/or incorporate and/or operate said — Oil Corporation, the allegations of truth in respect thereto going only to the allegation that the defendant caused said — Oil Corporation to be organized and incorporated and operated;

(j) That said indictment fails to disclose and it can not be ascertained therefrom how the truth of the alleged fact that the defendant participated in the operation of the said corporation has any bearing on the fact or the question as to whether or not defendant testified that he had not operated said corporation.

3. That said indictment is unintelligible for the reasons that it is uncertain;

4. That said indictment is ambiguous for the reasons that it is uncertain and unintelligible;

5. That said indictment improperly fails to set forth separately various counts of alleged perjury;

6. That several allegations of perjury have been improperly joined without being separately stated;

7. That from said indictment it appears that the proceedings before said Securities and Exchange Commission were ex parte and, hence, no perjury could have been committed.

Respectfully submitted,

Attorney for defendant.

I, —, hereby certify that I have examined the indictment herein and investigated the law applicable thereto, and that, in my opinion the within demurrer is well taken; that the same is filed in good faith and not for the purpose of delay.

Date—.

Attorney for defendant.

Source of Form.

From the record in Woolley v. United States, 305 U. S. 614, 83 L. ed. 391, 59 Sup. Ct. 73.

Cross-Reference.

In connection with Forms 757 to 759, see notes to Form 756.

758. Demurrer to Indictment Charging Conspiracy.

(Caption.)

Defendant demurs to the indictment herein on the following grounds:

1. That said indictment is bad for duplicity in that it charges in a single count a conspiracy to commit more than one offense, to wit: [Here insert].

2. That said indictment does not state facts sufficient to constitute an offense against the United States.

Wherefore, defendant prays judgment dismissing the indictment and discharging him from custody.

Date_____

Attorney for defendant._____
Address.**759. Order Sustaining Demurrer to Indictment.**

(Caption.)

This cause having come on for hearing on the demurrer to the indictment, and after hearing the attorney for defendant in support of the demurrer and —, assistant United States attorney, in opposition thereto, and the court being duly advised in the premises, it is

Ordered, that the demurrer to the indictment herein be and it is hereby sustained, and said indictment is hereby dismissed; and it is further

Ordered, that the defendant — be and he is hereby discharged from custody.

Date_____

United States district judge.**Statutory Reference.**

Judgment upon overruling demurrer, 7
F. C. A., Title 18, § 561; U. S. C. A., Title
18, § 561; id. U. S. C.

760. Plea of Guilty.

District Court of the United States

District of _____

United States

v.

} ss:

No. _____

PLEA

Order entered — —, 19—.

The United States attorney being present, defendants appear, are arraigned and enter pleas of guilty to the indictment herein, and are com-

mitted to the custody of the marshal to await the further order of the court.

Judge.

Source of Form.

From the record of *Zerbst v. Kidwell*, 304 U. S. 359, 82 L. ed. 1399, 58 Sup. Ct. 872, 116 A. L. R. 808.

Standing mute, 7 F. C. A., Title 18, § 564; U. S. C. A., Title 18, § 564; id. S. C.

Withdrawal of plea, 8 F. C. A., Title 28, § 723a; U. S. C. A., Title 28, § 723a; id. U. S. C.

Statutory References.

Effect of plea, 7 F. C. A., Title 18, § 564; U. S. C. A., Title 18, § 564; id. U. S. C.

761. Plea in Bar (Former Conviction or Acquittal).

(Caption.)

Now comes —, the defendant herein, and pleads in bar to the indictment herein as follows:

1. On the — day of —, 19—, a grand jury for the United States of America, duly impaneled in the District Court of the United States for the — District of —, holding sessions at —, returned in said court a good and sufficient indictment against this defendant charging him with the same acts as are charged against him in the indictment herein, a certified copy of which former indictment is annexed hereto as "Exhibit A."

2. On the — day of —, 19—, the defendant was duly arraigned on the charges contained in said former indictment and pleaded not guilty thereto, and was thereupon placed on trial in said court.

3. On the — day of —, 19—, a jury duly impaneled in said cause rendered a verdict of guilty (not guilty) on said charge.

4. Upon the return of said verdict the court entered a judgment of conviction (acquittal) thereon, a certified copy of which is annexed hereto as "Exhibit B."

Wherefore, defendant prays that the indictment herein be dismissed and that he be discharged from custody.

Attorney for defendant.

Date—.

Address.

Statutory Reference.

See U. S. Const., Amend. 5.

NOTES TO DECISIONS

In General.

It is not necessary to prove a formal judgment to sustain a plea of former acquittal or conviction, but it is necessary to show that the trial came to an actual

end. *Stroud v. United States*, 251 U. S. 15, 64 L. ed. 103, 40 Sup. Ct. 50.

Special plea of former jeopardy alleging identity of persons, time, circumstances, articles, and conduct was good.

United States v. Clavin (D. C.-N. Y.), 272 Fed. 985.

To support plea of former acquittal it must appear that the offense charged in the two indictments was the same in law and in fact. *Lopez v. United States* (C. C. A. 1), 17 Fed. (2d) 462.

Ordinarily the defense of former acquittal or conviction must be specially pleaded. *Brady v. United States* (C. C. A. 8), 24 Fed. (2d) 399. See also *United States v. Wilson*, 7 Pet. (32 U. S.) 150, 8 L. ed. 640; *United States v. J. L. Hopkins & Co.* (D. C.-N. Y.), 228 Fed. 173.

The defense of former acquittal or conviction can not be raised for the first time by motion in arrest of judgment, or motion for new trial, or on appeal. *Brady v. United States* (C. C. A. 8), 24 Fed. (2d) 399. See also *Levin v. United States* (C. C. A. 9), 5 Fed. (2d) 598. Cert den. 269 U. S. 562, 70 L. ed. 412, 46 Sup. Ct. 21.

The plea must allege that the former trial was in a court having jurisdiction of the case and must set forth the substance of the record. *United States v. Radov* (C. C. A. 3), 44 Fed. (2d) 155.

762. Plea of Former Jeopardy.

(Caption.)

Now comes —, the defendant, and pleads in bar to the indictment herein as follows:

1. On the — day of —, 19—, a grand jury for the United States of America, duly impaneled in the District Court of the United States for the — District of —, holding sessions at —, returned in said court a good and sufficient indictment against this defendant, charging him with the same acts as are charged against him in the indictment herein, a certified copy of which former indictment is annexed hereto as "Exhibit A."

On the — day of —, 19—, the defendant was duly arraigned on the charges contained in said former indictment and pleaded not guilty thereto. Thereupon, a jury was duly impaneled and sworn for the trial of said cause, and evidence was adduced on behalf of the prosecution.

3. Thereafter, on the — day of —, 19—, and before the completion of the trial, said trial was terminated by the court and said jury was discharged, without the consent and against the objections of the defendant. By virtue of the premises, the defendant has already been placed in jeopardy for the same offense as that charged in the indictment herein.

Wherefore, defendant prays that the indictment herein be dismissed and that he be discharged from custody.

Attorney for defendant.

Address.

Cross-Reference.

See notes to Form 761.

Statutory Reference.

See U. S. Const., Amend. 5.

763. Plea in Bar (Pardon).

(Caption.)

Now comes —, the defendant herein, and pleads in bar to the indictment herein as follows:

On the — day of —, 19—, the defendant was duly pardoned by the President of the United States for the same offense with which defend-

ant is charged in the indictment herein, as appears from the warrant of pardon, a certified copy of which is annexed hereto as "Exhibit A."

Wherefore, defendant prays judgment herein dismissing the indictment and discharging him from custody.

Attorney for defendant.

Date_____.

Address.

764. Plea in Bar (Statute of Limitations).

(Caption.)

Now comes _____, the defendant herein, and pleads in bar to the indictment in this action as follows:

The said indictment was not found within three years next after the offenses alleged therein were said to have been committed, and therefore this defendant may not be prosecuted, tried, or punished therefor.

Wherefore, defendant prays judgment dismissing the indictment herein and each and every count thereof, and discharging him from custody.

Attorney for defendant.

Date_____.

Address.

Statutory References.

See 7 F. C. A., Title 18, §§ 581 to 590; U. S. C. A., Title 18, §§ 581 to 590; id. U. S. C.

The Act of May 10, 1934, ch. 278, § 1, 48 Stat. 772 (7 F. C. A., Title 18, § 587; U. S. C. A., Title 18, § 587; id. U. S. C.) has been amended by the Act of July 10, 1940, ch. 567, 54 Stat. 747, to read as follows: "Whenever an indictment is

found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session."

NOTES TO DECISIONS

In General.

An indictment charging a conspiracy in restraint of trade, alleging the continuance of the conspiracy, must be denied under the general issue and not by a special plea. *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. 124; *United States v. Barber*, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. 209.

Where indictment charging conspiracy alleges that it continued to date of filing, that allegation must be denied under the general issue and not by a special plea of statute of limitations. *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. 124.

A plea of the statute of limitations is a plea in bar and may be raised by a special plea, but is also in issue under a plea

of not guilty. *Forthoffer v. Swope* (C. C. A. 9), 103 Fed. (2d) 707.

The plea of limitations may be raised by special plea but it is not necessary in criminal cases. *United States v. Brown* (D. C.-Mass.), Fed. Cas. No. 14665, 2 Lowell 267. See also *United States v. J. L. Hopkins & Co.* (D. C.-N. Y.), 228 Fed. 173.

Defendant may not plead the bar of limitations and also plead the general issue. Double pleading is unknown in criminal law. *United States v. Shorey* (C. C.-N. H.), Fed. Cas. No. 16280.

Demurrer.

Defendant can not by demurrer set up the statute of limitations as a defense, where the act defining the offense con-

tains neither an exception nor a proviso of any kind. *United States v. Cook*, 17 Wall. (84 U. S.) 168, 21 L. ed. 538.

Where the indictment for an offense against the United States does not show upon its face that the defendants are not within the exception created by a section of the statute, the defendants can not by demurrer, avail themselves of the bar of limitations, but by a special plea in abatement. *United States v. Brace* (D. C.-Cal.), 143 Fed. 703.

The defense of the statute of limitations can not be made by demurrer. *Greene v. United States* (C. C. A. 5), 154 Fed. 401. *Cert. den.* 207 U. S. 596, 52 L.

ed. 357, 28 Sup. Ct. 261; *United States v. Andem* (D. C.-N. Y.), 158 Fed. 996; *Hedderly v. United States* (C. C. A. 9), 193 Fed. 561.

Limitations must be specially pleaded and can not be presented by demurrer, but the form of the plea is immaterial if it substantially raises the issue. *Capone v. Aderhold* (D. C.-Ga.), 2 Fed. Supp. 280. *Affd.* 65 Fed. (2d) 130.

The defendant may avail himself of the statute of limitations by demurrer. *United States v. Watkins* (C. C.-D. C.), *Fed. Cas. No. 16649*, 3 Cranch C. C. 441; *United States v. White* (C. C.-D. C.), *Fed. Cas. No. 16678*, 5 Cranch C. C. 368.

765. Subpoena.

District Court of the United States

To _____

You are hereby commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the _____ at the courthouse, in the city of _____, in said district, on the _____ day of _____, 19____, at _____ M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the court without leave thereof, or of the United States attorney.

Witness, the Honorable _____ Judge of said District Court of the United States, this _____ day of _____, 19____, and in the _____ year of the Independence of the United States of America.

Clerk.

Deputy clerk.

UNITED STATES MARSHAL'S RETURN

Received this writ at _____ on _____ and on _____ at _____, I served it on the within-named _____ and left a true copy thereof, with the person-named above.

Marshal's Fees

Travel.....\$ _____

Service.....\$ _____

\$ _____

United States marshal.

Deputy.

Cross-Reference.

See Forms 554-560, and notes thereto.

Statutory References.

Form of subpoena, attendance thereunder, 8 F. C. A., Title 28, § 655; U. S. C. A., Title 28, § 655; id. U. S. C.

Subpoena duces tecum, 8 F. C. A., Title 28, § 647; U. S. C. A., Title 28, § 647; id. U. S. C.

Subpoena for witnesses outside jurisdiction of U. S., 8 F. C. A., Title 28, §§ 711 to 718; U. S. C. A., Title 28, §§ 711 to 718; id. U. S. C.

Subpoenas may run into other districts, 8 F. C. A., Title 28, § 654; U. S. C. A., Title 28, § 654; id. U. S. C.

NOTES TO DECISIONS**In General.**

A subpoena duces tecum directed to a corporation is not invalid because it does not conform to 8 F. C. A., Title 28, § 655; U. S. C. A., Title 28, § 655; id. U. S. C. *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. 538, Ann. Cas. 1912D, 558.

Where a subpoena contained the usual provision that witness was not to depart the court without leave, the fact that the subpoena ordered the witness to attend on April 2 did not excuse his attendance at the trial on April 9, there having been a continuance until the later date. *Blackmer v. United States*, 284 U. S. 421, 76 L. ed. 375, 52 Sup. Ct. 252, affg. 60 App. D. C. 141, 49 Fed. (2d) 523.

8 F. C. A., Title 28, §§ 574, 655; U. S. C. A., Title 28, §§ 574, 655; id. U. S. C. require that the names of as many witnesses as convenience in serving will permit be included in one subpoena. *In re Shaw (C. C.-N. Y.)*, 172 Fed. 520.

The witness should be informed of the matter about which he will be called on

to testify. *In re Shaw (C. C.-N.Y.)*, 172 Fed. 520. See also *United States v. Ralston (C. C.-Va.)*, 17 Fed. 895.

It is not necessary that subpoena to appear, produce papers, and testify before a grand jury should specify the nature of the investigation or name the parties against whom the investigation is directed. *In re National Window Glass Workers (D. C.-Ohio)*, 287 Fed. 219.

A subpoena commanding the production of documentary evidence on the taking of a deposition should not be quashed if the materiality of the documents demanded is shown by the pleadings. 403-411 East 65th St. Corp. v. Ford Motor Co. (D. C.-N. Y.), 27 Fed. Supp. 37.

A subpoena for the production of documents should contain a time limitation as to the period covered by the records demanded, but such limitation may appear from the allegations of the complaint. 403-411 East 65th St. Corp. v. Ford Motor Co. (D. C.-N. Y.), 27 Fed. Supp. 37.

766. Motion for New Trial.

(Caption.)

To — Esquire,

United States attorney.

Please take notice that on — —, 19—, at — —. M., or as soon thereafter as counsel can be heard defendant will move this court at — for an order setting aside the verdict and granting a new trial herein on the following grounds:

1. The court erred in overruling defendant's motion to quash the indictment.
2. The court erred in overruling defendant's demurrer to the indictment.
3. The court erred in overruling defendant's objection to the admission of the following testimony of — at the trial for the reason that —, to wit: [Here insert].

4. The court improperly refused to admit the following evidence offered on behalf of the defendant, to wit: [Here insert].

5. The court erred in refusing to direct a verdict of not guilty at the close of all of the evidence.

6. The court erred in refusing to give the following instructions requested by the defendant: [Here insert].

7. The court erred in instructing the jury as follows: [Here insert].

8. The court erred in denying defendant's motion for a mistrial because of prejudicial remarks made during the trial by counsel for the government, to wit: [Here insert].

9. The jury was not secluded and kept together during its deliberations, but individual members of the jury were permitted to become separated from other members.

10. The jury received communications from outside sources during its deliberations, to wit: [Here insert].

11. One of the jurors, to wit, AB, was disqualified to serve as such, because —, but his disqualification was unknown to defendant.

12. The court erred in refusing to sustain defendant's challenge to juror AB, on the ground that —.

13. The bailiff in charge of the jury during its deliberations was not duly sworn as required by law.

Date——.

Attorney for defendant.

Statutory References.

Time for motion, Rules of Practice and Procedure (Criminal), Rule 2 (2), (3), 7 F. C. A. p. 430.

See annotations to criminal law and procedure in general following 7 F. C. A., Title 18, § 575.

767. Motion for New Trial for Newly-Discovered Evidence.

(Caption.)

Defendant moves this court for an order directing a new trial herein on the ground that defendant has discovered material evidence which could not with due diligence have been obtained for use at the trial of this case, to wit: [Here insert].

Attorney for defendant.

Date——.

Address.

Statutory Reference.

General provisions and time for motion, Rules of Practice and Procedure (Criminal), Rule 2 (3), 7 F. C. A., p. 430.

768. Order Granting Motion for New Trial.

(Caption.)

This cause was heard on motion of defendant for a new trial and after hearing counsel and the court being fully advised it is

Ordered, that the verdict herein be and it is hereby set aside and defendant's motion for a new trial is hereby granted.

Date——.

United States district judge.

Cross-Reference.

See notes to Forms 766, 767.

769. Judgment and Commitment.

District Court of the United States

____ District ____

____ Division

United States

v.

} } }	No. — Criminal indictment (information) in
	— counts for violation of U. S. C., Title —,
	sections —.

JUDGMENT AND COMMITMENT

On this — day of —, 19—, came the United States attorney, and the defendant — appearing in proper person, and by counsel (having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the court, replied that he did not) and,

The defendant having been convicted on his plea of guilty (plea of nolo contendere) (verdict of guilty) of the offense— charged in the indictment (information) in the above-entitled cause, to wit: [Name specific offense or offenses and specify counts upon which convicted], and the defendant having been now asked whether — has anything to say why judgment should not be pronounced against —, and no sufficient cause to the contrary being shown or appearing to the court, It is by the court

Ordered and adjudged, that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the attorney-general for imprisonment in an institution of the [Insert type of institution such as "jail," "training school," "reformatory," "penitentiary," or "special." If prisoner's circumstances require special type institution, marshal should submit facts and recommendations of court to attorney-general where regulations do not apply] type to be designated by the attorney-general or his authorized representative for the period of [Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to

begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence] and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law. [Strike out if the court did not so order].

It is further ordered, that [Indicate any order with respect to suspension and probation].

It is further ordered, that the clerk deliver a certified copy of this judgment and commitment to the United States marshal or other qualified officer and that the same shall serve as the commitment herein.

United States district judge.

A True Copy. Certified this ____ day of ____, 19—.

Clerk.

Deputy clerk.

Note.

Certified copy to accompany defendant to institution.

United States,
v.

} No. ____ Criminal indictment (information) in
} ____ counts for violation of U. S. C., Title ____,
} sections. ____.

RETURN

I have executed the within judgment and commitment as follows:

Defendant delivered on ____, 19— to [jail, etc.].

Defendant noted appeal on ____, 19— and released ____, 19—.

Defendant's appeal determined on ____, 19—.

Defendant surrendered on ____, 19—.

Defendant delivered on ____, 19— to [institution] at ____, the institution designated by the attorney-general, together with certified copy of the within judgment and commitment.

United States marshal.

Deputy.

Statutory References.

Corruption of blood or forfeiture of estate forbidden, U. S., Const. Art. 1, § 9, 7 F. C. A., Title 18, § 544; U. S. C. A., Title 18, § 544; id. U. S. C.

Court's power to impose sentence of hard labor, 7 F. C. A., Title 18, § 572; U. S. C. A., Title 18, § 572; id. U. S. C.

Execution against property or imprisonment for fines, 7 F. C. A., Title 18, § 569; U. S. C. A., Title 18, § 569; id. U. S. C.

Industrial reformatory, sentence need not designate, 7 F. C. A., Title 18, § 831; U. S. C. A., Title 18, § 831; id. U. S. C.

Place of confinement, transfer, 7 F. C. A., Title 18, § 753f; U. S. C. A., Title 18, § 753f; id. U. S. C.

Punishment by whipping and standing in the pillory forbidden, 7 F. C. A., Title 18, § 545; U. S. C. A., Title 18, § 545; id. U. S. C.

Time for sentence, Rules of Practice and Procedure (Criminal), Rule 1, 7 F. C. A., p. 430.

Writ as jailor's authority, 7 F. C. A., Title 18, § 603; U. S. C. A., Title 18, § 603; id. U. S. C.

NOTES TO DECISIONS

In General.

Warrant of commitment is a final process for carrying judgment into effect and is void when it departs in substance from the judgment supporting it. *Sengstack v. Hill* (D. C.-Pa.), 16 Fed. Supp. 61.

Commitment issued by clerk committing defendant to custody of attorney-general was valid where judgment specified term of imprisonment and type of institution in which imprisonment was to be served. *Sengstack v. Hill* (D. C.-Pa.), 16 Fed. Supp. 61.

Change of Sentence.

Where maximum term of imprisonment for single offense is two years, judgment imposing imprisonment for five years is void as to such excess and prisoner is entitled to discharge on writ of habeas corpus, but not before reasonable opportunity is given court to correct its judgment, of which attorney-general should be given reasonable notice. *Ex parte Peeke* (D. C.-N. J.), 144 Fed. 1016. Affd. 153 Fed. 166.

Concurrent or Consecutive Terms.

As ordinarily two or more sentences run concurrently in absence of specific provisions in judgment to contrary, which rule applies where conviction is had in different courts, where prisoner was imprisoned for term on designation of attorney-general to same prison where he was then serving another sentence from another court, such sentences ran concurrently after warden received commitment on later sentence. *Zerbst v. Lyman* (C. C. A. 5), 255 Fed. 609, 5 A. L. R. 377.

Conviction to Several Counts.

Persons convicted on two counts of indictment may be sentenced to be imprisoned in penitentiary for term of one year on first count and of six months on second count, to run successively, as two sentences imposed should be regarded as single sentence. *Thompson v. United*

States (C. C. A. 9), 204 Fed. 973, affg. 202 Fed. 346.

Nature of Punishment.

Judgment reversed for failure to sentence to hard labor, where such sentence is required by statute. *Harman v. United States* (C. C.-Kans.), 50 Fed. 921.

Sentence to state prison with provision for subjection to same discipline as state convicts was not a sentence to hard labor. *Hart v. United States* (C. C. A. 3), 84 Fed. 799, affg. 78 Fed. 868.

Court authorized to amend sentence by nunc pro tunc order so as to provide for hard labor, where statute required such punishment. *In re Welty* (D. C.-Kans.), 123 Fed. 122.

Place of Imprisonment.

Where record of judgment, sentencing person convicted in one state to imprisonment in prison in another state, omits to state that there was no suitable penitentiary within state and that attorney-general had designated prison in another state as suitable place of imprisonment, such omission is not material, and affords no grounds for discharging prisoner on habeas corpus petition. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. 935.

Where attorney-general has designated no prison in another district or territory in which criminals sentenced by District Court of Southern District of New York must be confined, prisoners may be sent by court to Erie County penitentiary by virtue of R. S., § 5541. *United States v. McMahon* (C. C. A. 2), 65 Fed. 976. Revd. 164 U. S. 81, 41 L. ed. 357, 17 Sup. Ct. 28.

Sentence to confinement in jail of named county, without specifying any state, was good. *Ozello v. United States* (C. C. A. 7), 268 Fed. 242.

Motion to dismiss on trial or motion in arrest of judgment does not present objections of vagueness or duplicity. *Barnard v. United States* (C. C. A. 9), 16 Fed.

(2d) 451. Cert. den. 274 U. S. 736, 71 L. ed. 1316, 47 Sup. Ct. 575.

Sentence held not void because it did not designate the type of institution for imprisonment, but instead left the designation to the attorney-general. *Aderhold v. Edwards* (C. C. A. 5), 71 Fed. (2d) 297.

The trial judge has power to designate the institution in which persons convicted of federal crimes shall be confined. *Andreas v. Clark* (C. C. A. 9), 71 Fed. (2d) 908. Cert. den. 293 U. S. 555, 79 L. ed. 657, 55 Sup. Ct. 111.

Where defendant was convicted of violating 7 F. C. A., Title 18, § 408a; U. S. C. A., Title 18, § 408a; id. U. S. C., his sentence "to the custody of the attorney-general of the United States, or his authorized representative, for confine-

ment in a United States penitentiary, during the term of his natural life," was proper. *Bailey v. United States* (C. C. A. 10), 74 Fed. (2d) 451.

Failure of sentence to expressly commit defendant to custody of attorney-general, or to specifically designate any type of institution for serving of term did not render judgment void entitling defendant to discharge. *Wilson v. Aderhold* (C. C. A. 5), 84 Fed. (2d) 806.

Place of execution of sentence is no part of the sentence. *Sengstack v. Hill* (D. C.-Pa.), 16 Fed. Supp. 61.

Designation of the institution where sentence is to be served is not a necessary and proper part of the judgment requiring the petitioner to serve time specified. *United States ex rel. Anagnosti v. Hill* (D. C.-Pa.), 24 Fed. Supp. 53.

770. Motion in Arrest of Judgment.

(Caption.)

To _____, Esquire

United States attorney.

Please take notice that on — — —, 19—, at — —. M., or as soon thereafter as counsel can be heard, defendant will move this court at — to arrest judgment herein on the following grounds:

1. The facts set forth in the indictment herein are not sufficient to show the commission of any act in violation of any law of the United States, in that [Here insert].

2. The indictment herein fails to set forth facts constituting a crime within the jurisdiction of this court.

3. The indictment herein fails to set forth facts showing commission of a crime within the — District of —.

4. The indictment herein is bad for duplicity, to wit: [Here insert].

Date—.

Attorney for defendant.

Statutory References.

Indictment not insufficient for imperfection in form or because of attendance of clerical assistants before grand jury, 7 F. C. A., Title 18, § 556; U. S. C. A., Title 18, § 556; id. U. S. C.

Time for Motion, Rules of Practice and Procedure (Criminal), Rule 2 (2), 7 F. C. A., p. 430.

See 7 F. C. A., Title 18, § 575; U. S. C. A., Title 18, § 575; id. U. S. C.

NOTES TO DECISIONS

In General.

Objection that indictment is multifarious can not be taken after verdict. *Dur-*

land v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. 508.

Only objection that can be made after plea of guilty is that acts are not charged

with certainty requisite to make a valid indictment. *United States v. Bayand* (C. C.-N. Y.), 16 Fed. 376.

Objections to indictment not affecting substantial rights of accused can not be urged after verdict. *Sheridan v. United States* (C. C. A. 9), 236 Fed. 305. Cert. den. 243 U. S. 638, 61 L. ed. 942, 37 Sup. Ct. 402.

Motion in arrest of judgment reaches only defects of substance. *Gibson v. United States* (C. C. A. 9), 31 Fed. (2d)

19. Cert. den. 279 U. S. 866, 73 L. ed. 1004, 49 Sup. Ct. 481.

Where defect in indictment is matter of substance and not of form, the point may be raised by motion in arrest of judgment. *United States v. McGuire* (C. C. A. 2), 64 Fed. (2d) 485. Cert. den. 290 U. S. 645, 78 L. ed. 560, 54 Sup. Ct. 63.

Motion in arrest of judgment can be based only on errors which appear upon face of record. *Sherman v. United States* (C. C. A. 4), 80 Fed. (2d) 629.

771. Order Granting Motion in Arrest of Judgment.

(Caption.)

This cause was heard on defendant's motion in arrest of judgment and after hearing counsel and the court being fully advised it is

Ordered, that defendant's motion in arrest of judgment herein be and it is hereby granted and the verdict herein be and it is hereby set aside.

Date——.

United States district judge.

Cross-Reference.

See notes to Form 770.

772. Notice of Appeal in Criminal Case.

(To be used on appeals to the United States Circuit Court of Appeals.)

District Court of the United States

———— District of ————

United States of America

v.

Name and address of appellant ———.

Name and address of appellant's attorney ———.

Offense ———.

Date of judgment ———, 19——.

Brief description of judgment or sentence ———.

Name of prison where now confined, if not on bail ———.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the ——— Circuit from the judgment above-mentioned on the grounds set forth below.

Date——.

Appellant.

Grounds of appeal: [Here insert].

Source of Form.

Rules of Practice and Procedure (Criminal), Form 1 (7 F. C. A., p. 433).

Statutory References.

Appeal in case of death penalty, 7 F. C. A., Title 18, § 681; U. S. C. A., Title 18, § 681; id. U. S. C.

Appeals by the United States, 7 F. C. A., Title 18, § 682; U. S. C. A., Title 18, § 682; id. U. S. C.

Appeals in general, Rules of Practice and Procedure (Criminal), Rules 3-12, 7 F. C. A., pps. 431-433.

General provisions concerning appeals, 8 F. C. A., Title 28, §§ 861 to 880; U. S. C. A., Title 28, §§ 861 to 880; id. U. S. C.

Notice required, form of notice, service, Rules of Practice and Procedure (Criminal), Rule 3, 7 F. C. A., p. 431.

Time for appeal, Rules of Practice and Procedure (Criminal), Rule 3, 7 F. C. A., p. 431.

773. Notice of Appeal in Criminal Case.

(To be used on appeals to the United States Court of Appeals for the District of Columbia.)

District Court of the United States
For the District of Columbia.

United States of America

v.

Name and address of appellant ____.

Name and address of appellant's attorney ____.

Offense ____.

Date of judgment ____ —, 19—.

Brief description of judgment or sentence ____.

Name of prison where now confined, if not on bail ____.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment above-mentioned on the grounds set forth below.

Date ____.

Appellant.

Grounds of appeal: [Here insert].

Source of Form.

Cross-Reference.

Rules of Practice and Procedure (Criminal), Form 2 (7 F. C. A., p. 433).

See notes to Form 772.

774. Supersedeas Bond.

(Title of court and cause.)

Know All Men by These Presents:

That we, AB, of the county of —, as principal, and GH and JK both of said county of —, as sureties, are jointly and severally held and firmly bound unto the United States of America in the sum of — dollars (\$—), for the payment of which said sum, we, and each of us, bind ourselves, our heirs, executors, administrators, and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to wit, on the — day of —, 19—, at a term of the District Court of the United States, in and for the — District of Cali-

fornia, — Division, in an action pending in the said court in which the United States of America was plaintiff and AB was defendant, a judgment and sentence was made, given, rendered, and entered against the said AB, in the above-entitled action, wherein he was convicted as charged in the indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said AB, he was by said judgment sentenced to three years imprisonment in a federal penitentiary to be thereafter designated and to pay a fine of — dollars (\$—).

Whereas, the said AB has filed a notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the — Circuit; and

Whereas, the said AB has been admitted to bail pending the decision upon said appeal in the sum of — dollars (\$—).

Now, therefore, the conditions of this obligation are such that if said AB shall appear in person or by his attorney in the United States Circuit Court of Appeals for the — Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his appeal; and if the said AB shall abide by and obey the orders made by the said United States Circuit Court of Appeals for the — Circuit, and if the said AB shall surrender himself in execution of said judgment and sentence, if the judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the — Circuit; and if the said AB will appear for trial in the District Court of the United States in and for the — District of California, — Division, on such day or days as may be appointed for retrial by said District Court, if the said judgment and sentence against him be reversed,

Then this obligation shall be null and void, otherwise to remain in full force and effect.

AB.
Principal.

Address.

Lot —, Tract No. — as per Bk. — pg. — to — of Maps Records of — Co. Value — dollars (\$—). Clear.

GH.
Surety.

Address.

Lot —, Tract No. — as per Bk. — pg. — as Maps Records of — Co. Value — dollars (\$—). Clear.

JK.
Surety.

Address.

I hereby certify that I have examined the within sureties and find them good and sufficient.

[SEAL]

United States Commissioner.

Source of Form.

Woolley v. United States, 805 U. S. 614,
83 L. ed. 391, 59 Sup. Ct. 73.

Statutory Reference.

When bail may be granted, Rules of
Practice and Procedure (Criminal), Rule
6, 7 F. C. A., p. 431.

775. Order Extending Time to Settle and File Bill of Exceptions.

(Caption.)

Upon reading and filing the affidavit of —, Esquire, sworn to the
— day of —, 19—, and due deliberation having been had, it is

Ordered, that the time within which the bill of exceptions is to be settled
and filed be extended to and including the — day of —, 19—.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 776.

Statutory Reference.

Time for and extension of time for bill
of exceptions, Rules of Practice and Pro-
cedure (Criminal), Rule 9, 7 F. C. A., p.
431.

NOTES TO DECISIONS

In General.

Where trial judge, by valid order, had
extended the time within which bill of
exceptions might be filed "to and includ-
ing the 1st day of November, 1936," and
that day fell on Sunday, the order per-
mitted filing on the following day. Ray
v. United States, 301 U. S. 158, 81 L. ed.
976, 57 Sup. Ct. 700, affg. (C. C. A. 2),
86 Fed. (2d) 942.

Order extending time for presentment
of bill of exceptions to trial court, not fix-
ing time within which bill should be
settled and filed was void and bill not

settled for more than five months after
appeal was taken would be stricken.
Wolpa v. United States (C. C. A. 8), 84
Fed. (2d) 829.

Since Rule 9 of Rules of Practice and
Procedure (Criminal), governs the settle-
ment of bills of exceptions, courts are
without power to settle them in violation
of this rule. Pinkussohn v. United States
(C. C. A. 7), 88 Fed. (2d) 70; Long v.
United States (C. C. A. 9), 90 Fed. (2d)
482. See also Wolpa v. United States (C.
C. A. 8, 84 Fed. (2d) 829.

776. Bill of Exceptions.

(Caption.)

The above-entitled cause came on for trial on the — day of —, 19—,
before the Honorable —, United States district judge, holding a —
term of the United States District Court for the — District of —,
and the following proceedings were had.

Appearances:

—, United States Attorney, attorney for the United States. —, —, and —, Assistant United States Attorneys, of Counsel. —, Attorney for defendant, —. —, —, and — of counsel.

(A jury was duly impaneled and sworn.)

Mr. — opened the case to the jury on behalf of the government.

Mr. — opened the case to the jury on behalf of the defendant, —.

—, called as a witness on behalf of the government, being duly sworn, testified as follows: [Direct examination by Mr. —.]

Mr. —, Defense Counsel: I object to that, your honor, on the ground that —.

The court: Overruled.

Mr. —: Exception.

Cross-examination by Mr. —: [Here insert].

Mr. —, Attorney for the United States: The government rests.

Mr. —, Attorney for defendant: I move for a directed verdict on the ground that —.

The court: Motion overruled.

Mr. —, Attorney for defendant: Exception.

Mr. —, called as a witness on behalf of the defendant, being duly sworn, testified as follows: [Direct examination by Mr. —.]

Cross-examination by Mr. —.

Mr. —, Attorney for defendant:

I move to strike out the testimony given by the witness — as to conversations and transactions with the defendant —, all having been in the absence of the defendant — on the ground that it has not been shown by any evidence at the time of the alleged conversations or transactions that there was a conspiracy existing between —, —, and —.

I move that the court direct a verdict of not guilty, on the following grounds:

1. _____.
2. _____.
3. _____.

The court: Motions denied.

Mr. — (defendant's attorney): I except separately to the denial of each of the foregoing motions.

Mr. —, summed up on behalf of the defendant.

Mr. —, summed up on behalf of the United States.

REQUESTS TO CHARGE ON BEHALF OF (DEFENDANT).

(Caption.)

The defendant, —, respectfully requests the court to charge the jury as follows:

1. _____.
2. _____.
3. _____.

Respectfully submitted,

Attorneys for defendant.

CHARGE OF THE COURT

The court (—, J.):

Mr. —, Attorney for defendant:

I except to so much of your honor's charge as provides as follows: [Here state substance of the portion of the charge to which exception as directed, making each exception deal with only one point in the charge].

I except to your honor's failure to charge defendant's request No. —.

I request your honor to charge the jury as follows: [Here insert].

The court: Denied.

Mr. —, Attorney for defendant: Exception.

The jury thereafter returned a verdict of guilty as charged in the indictment.

Mr. —, Attorney for defendant:

I move in arrest of judgment on the following grounds:

1. _____.
2. _____.
3. _____.

The court: Denied.

Mr. —: Exception.

JUDGMENT

(Caption.)

On Motion of the United States attorney:

It is thereupon ordered and adjudged that the above-named defendant be committed to the custody of the attorney-general of the United States or his authorized representative for imprisonment in a penitentiary for and during the term and period of — years, and fined — dollars (\$—), and to stand committed until such fine shall be paid or until he shall be otherwise discharged by due course of law.

Filed —.

United States district judge.

GOVERNMENT'S EXHIBITS

1. _____.
2. _____.
3. _____.

DEFENDANT'S EXHIBITS

1. _____.
2. _____.
3. _____.

STIPULATION AS TO EXHIBITS

(Caption.)

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the printing in full of government's exhibits Nos. —, —, —; and defendant's exhibits Nos. —, —, —; all of which are digested and described in the record, be waived.

It is further stipulated and agreed that said digest of exhibits accurately describes such exhibits.

 Attorneys for defendant.

 United States attorney.

STIPULATION

(Caption.)

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record in the said District Court in the above-entitled matter as agreed on by the parties and that the foregoing record be submitted to the district judge to be ordered on file as the bill of exceptions and transcript of the record in the above-entitled matter.

 United States attorney.

 Attorney for defendant.

Date—.

ORDER SETTLING BILL OF EXCEPTIONS

Upon the annexed stipulation; the within bill of exceptions is hereby settled and allowed, and ordered to be filed and made a part of the transcript of record herein.

Date—.

 United States district judge.

Cross-Reference.

See notes to Form 775.

Statutory Reference.

Power of courts over record for appeal, Rules of Practice and Procedure (Criminal), Rules 4, 7, 9, 7 F. C. A., p. 431.

NOTES TO DECISIONS

In General.

A bill of exceptions was not settled and filed in time where it was prepared and agreed to by counsel for both sides and submitted to the clerk within 30 days after appeal was taken, but was not settled and signed by the trial judge until after 30 days. *Forte v. United States*, 302 U. S. 220, 82 L. ed. 209, 58 Sup. Ct. 180.

Bill of exceptions can be amended to show that a motion for directed verdict was made and refused and exception

noted, or whatever the fact may be. *Reiner v. United States* (C. C. A. 9), 92 Fed. (2d) 321.

Where clerk's record includes defendant's plea of former jeopardy and the order denying the same, but does not include the purported indictment, order, and verdict in the former case, and they are not incorporated in the bill of exceptions, they can not be considered by the reviewing court, even though certified by the clerk of the court. *Ross v. United States* (C. C. A. 9), 102 Fed. (2d) 113.

777. Precipe in Criminal Action.

(Title of court and cause.)

PRECIPE

To the clerk of the District Court of the United States,

_____ District of _____, _____ Division

Please prepare transcript on appeal in this cause and include therein the following:

1. Indictment.
2. Minutes of _____, 19—, pertaining to the arraignment.
3. Demurrer and motion to quash.
4. Minutes of _____, 19—, overruling the demurrer and dismissing motion to quash and showing plea of "Not Guilty."
5. Minutes of _____, 19—, showing the verdict.
6. Minutes of _____, 19—, showing the sentence.
7. Notice of appeal.
8. Minutes of _____, 19—, fixing the amount of bail.
9. Bail bond on appeal.
10. Statement of docket entries.
11. Assignment of errors.
12. Bill of Exceptions.
13. This precipe.

Date_____.

Attorneys for defendant.

Source of Form.

From record in *Woolley v. United States*, 305 U. S. 614, 83 L. ed. 391, 59 Sup. Ct. 73.

*** Statutory Reference.**

Power of courts over record for appeal, Rules of Practice and Procedure (Criminal), 4, 7, 9, 7 F. C. A., p. 431.

PART THREE

SPECIAL REMEDIES AND PROCEEDINGS

CHAPTER 23

HABEAS CORPUS

Form

- 785. Petition for writ of habeas corpus by prisoner in federal institution.
- 786. Order granting writ.
- 787. Writ of habeas corpus.
- 788. Answer.
- 789. Petition for writ of habeas corpus in deportation proceeding.
- 790. Order dismissing writ of habeas corpus in deportation proceeding.
- 791. Petition for writ of habeas corpus ad prosequendum.
- 792. Order directing issuance of writ of habeas corpus ad prosequendum.

Form

- 793. Writ of habeas corpus ad prosequendum.
- 794. Writ of habeas corpus ad prosequendum.
- 795. Petition for a writ of habeas corpus ad testificandum.
- 796. Writ of habeas corpus ad testificandum.
- 797. Petition for writ of habeas corpus in removal proceedings.
- 798. Order issuing writ of habeas corpus.

INTRODUCTION.—“The writ of habeas corpus is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of Car. II was enacted for the purpose of securing the benefits for which the writ was given.” *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 7 L. ed. 650.

The privileges of this writ, and the powers of the courts of the United States under it, are greater than were those of English courts and judges under the “Habeas Corpus Act” (Car. II)—as great, in fact, as the British judges and Lord Mansfield contended they were, during the parliamentary struggle concerning the act. And it is clear that Congress had in mind that struggle and its results when they framed the Judiciary Act of 1789 (1 Stat. 81), for the Supreme Court has pronounced the Habeas Corpus Act a mere enforcement of the common law, leaving the privileges of the writ not to depend upon the British statute, but upon rights beyond and above its provisions. *In re McDonald* (D. C.-Mo.), Fed. Cas. No. 8751.

The first Congress under the Constitution, after defining, by various sections of the Act of September 24, 1789, the jurisdiction of the District

Courts, the Circuit Courts and the Supreme Court in other cases, proceeded, in the 14th section, to enact, "that all the before-mentioned courts of the United States, shall have power to issue writs of * * *, habeas corpus, (e) and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81.

The Federal Rules of Civil Procedure are applicable to habeas corpus proceedings only in so far as the practice is not regulated by statute and has previously conformed to that prevailing in actions at law or suits in equity. Federal Rules of Civil Procedure, Rule 81 (a) (2).

785. Petition for Writ of Habeas Corpus by Prisoner in Federal Institution.

District Court of the United States

_____ District of _____

_____ Division

_____	}	Petitioner,
v.		
_____		Warden,
United States Penitentiary,		
_____, _____,		Respondent.

Habeas Corpus
No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Now comes —, and respectfully shows to this honorable court that he is a citizen of the United States and is now unlawfully held and restrained of his liberty by —, Warden of the United States penitentiary in —, —, within the jurisdiction of this honorable court.

1.

That your petitioner pleaded guilty in the District Court of the United States for the — District of — at —, —, to having violated U. S. C., Title 27, sections 12 and 39, of unlawfully manufacturing and possessing property designed for manufacturing intoxicating liquors, and the court, on September 27, 1932, thereupon passed upon your petitioner the following sentence:

"It is adjudged by the court that the defendant be confined in a United States penitentiary, or prison camp, for the term of two years from this — day of —, 19—, and the marshal is directed to deliver said defendant to the warden of said penitentiary or prison camp, so that sentence may be executed according to law."

That your petitioner entered upon and commenced to serve said sentence on or about —, —, 19—, and served continuously on said sentence until on or about August 27, 1933, when he was granted a parole.

That your petitioner served continuously on said parole until June 29, 1935, when he was returned to a United States penitentiary or prison camp, and has been continuously serving and confined in said penitentiary or prison camp since that date, and, counting the time served in a penitentiary or prison camp from on or about September 27, 1932, to the date his parole was granted, and the time served on parole, and the time served in a United States penitentiary or prison camp since June 29, 1935, he has more than fully and completely served and performed the maximum and maximum remainder of his sentence as originally imposed.

Certified copies of the original judgment, sentence, and final mittimus are hereto attached, marked "Exhibit A," and made a part of this petition.

2.

That your petitioner was indicted by a United States grand jury duly impaneled and sworn within the — District of — on or about May 17, 1934, and was charged with unlawfully, wilfully, and feloniously possessing a quantity of distilled spirits, to wit: — gallons, more or less, of whisky, in violation of U. S. C., Title 2, section 201.

That your petitioner having pleaded guilty to said indictment on June 18, 1935, in the United States District Court for the — District of —, then sitting at —, —, the court thereupon passed upon your petitioner, on June 29, 1935, the following sentence:

"Order Entered June 29, 1935. This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the attorney-general, or his authorized representative for confinement in an institution of the reformatory or penitentiary type for a period of two (2) years at hard labor, and they are now committed."

That your petitioner entered upon and commenced to serve said sentence on June 29, 1935, and has continuously served said sentence from that date, and has, counting the deductions from said sentence for good conduct to which petitioner is entitled by law, and also industrial good time or allowances, served said sentence in full it having been fully performed on or about January 16, 1937.

Certified copies of the original indictment, order, plea of guilty, and order of sentence and commitment are attached hereto, marked "Exhibit B," and made a part of this petition.

Petitioner, from the best of his knowledge, information, and belief, shows that his incarceration in the United States penitentiary at —, —, and the restraint of your petitioner's liberties by the respondent herein, the warden of said penitentiary, is being done under the color of authority of commitments under either one of the above-named sentences,

and that such restraint and incarceration is illegal for that said sentences have been fully served and performed as required by law.

Wherefore, your petitioner prays that he be released from unlawful custody and that this honorable court issue its writ of habeas corpus directing the respondent herein to produce the body of your petitioner before this honorable court at a time and place to be specified therein, and that said respondent be required to show cause, if any he has, why your petitioner should not be released.

Attorney for petitioner.

STATE OF _____, }
COUNTY OF _____, } ss:

Personally appeared before me _____, who being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein contained are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the redress sought therein.

Petitioner.

Sworn to and subscribed before me this _____ day of _____, 19____.

[SEAL]

Source of Form.

From record in *Zerbst v. Kidwell*, 304 U. S. 359, 82 L. ed. 1399, 58 Sup. Ct. 872, 116 A. L. R. 808.

Cross-Reference.

See notes to Forms 787, 788.

Statutory References.

Alaskan commissioners, power to issue writ, 5 F. C. A., Title 48, § 108; U. S. C. A., Title 48, § 108; id. U. S. C.

Allowance and direction of the writ, 8 F. C. A., Title 28, § 455; U. S. C. A., Title 28, § 455; id. U. S. C.

Answer to return, 8 F. C. A., Title 28, § 460; U. S. C. A., Title 28, § 460; id. U. S. C.

Form of and execution of petition or application, 8 F. C. A., Title 28, § 454; U. S. C. A., Title 28, § 454; id. U. S. C.

Form of return, 8 F. C. A., Title 28, § 457; U. S. C. A., Title 28, § 457; id. U. S. C.

General provisions concerning habeas corpus, 8 F. C. A., Title 28, §§ 451 to 466; U. S. C. A., Title 28, §§ 451 to 466; id. U. S. C.

Notary Public, — State at Large.

Issuance of writ in Puerto Rico, 5 F. C. A., Title 48, § 872; U. S. C. A., Title 48, § 872; id. U. S. C.

Nonresident aliens, cases involving law of nations, 8 F. C. A., Title 28, § 462; U. S. C. A., Title 28, § 462; id. U. S. C.

Power of governor of Hawaii to suspend writ, 5 F. C. A., Title 48, § 532; U. S. C. A., Title 48, § 532; id. U. S. C.

Power to issue, 8 F. C. A., Title 28, §§ 451, 452; U. S. C. A., Title 28, §§ 451, 452; id. U. S. C.

Production of body, 8 F. C. A., Title 28, § 458; U. S. C. A., Title 28, § 458; id. U. S. C.

Review and appeal, 7 F. C. A., Title 28, § 225; U. S. C. A., Title 28, § 225; id. U. S. C.; 8 F. C. A., Title 28, §§ 463 to 466; U. S. C. A., Title 28, §§ 463 to 466; id. U. S. C.

Time for hearing, 8 F. C. A., Title 28, § 459; U. S. C. A., Title 28, § 459; id. U. S. C.

Time for return, 8 F. C. A., Title 28, § 456; U. S. C. A., Title 28, § 456; id. U. S. C.

Writ in case of arrest of revenue officer by state authorities, 7 F. C. A., Title 28,

§ 76; U. S. C. A., Title 28, § 76; id. U. S. C.

Writ to enable Chinese person to land, 2 F. C. A., Title 8, § 286; U. S. C. A., Title 8, § 286; id. U. S. C.

Writ where petitioner is deprived of civil rights by state authorities, 7 F. C.

A., Title 28, § 75; U. S. C. A., Title 28, § 75; id. U. S. C.

Federal Rules of Civil Procedure.

Application of Rules of Civil Procedure in District Courts to habeas corpus proceedings, Rule 81 (a) (2).

NOTES TO DECISIONS

In General.

The writ need not be awarded if it appears on the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison. *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. 77.

It is well settled that a proceeding in habeas corpus is a civil, and not a criminal proceeding. *Farnsworth v. Montana*, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. 253; *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. 22, citing *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. 148; *Gonzales v. Cunningham*, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. 182; *In re King* (C. C.-Tenn.), 51 Fed. 434.

Application must show in whose custody and by virtue of what authority the petitioner is detained. *In re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. 703.

It should be made to appear on the application that it is founded on some matter which justifies the exercise of federal authority. *In re Burrus*, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. 850; *Erickson v. Hodges* (C. C. A. 9), 179 Fed. 177.

Being a civil process, the writ can not be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. *In re Frederick*, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. 793, citing *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 21 L. ed. 872; *In re Curtis*, 106 U. S. 371, 27 L. ed. 232, 1 Sup. Ct. 381; *In re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. 556; *In re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. 487.

Allegations were insufficient to show violation of petitioner's constitutional rights with respect to error in admission of evidence against him in hearing before court martial. *Collins v. McDonald*, 258 U. S. 416, 66 L. ed. 692, 42 Sup. Ct. 326.

It is apparent from 8 F. C. A., Title 28, § 455; U. S. C. A., Title 28, § 455; id.

U. S. C., that if it appears from the petition that the relator is not entitled to discharge, the court should deny his petition without issuing the writ. *In re Haskell* (C. C.-Ohio), 52 Fed. 795.

Petition only formally alleging restraint in violation of the Constitution and laws of the United States is not sufficient. *King v. McLean Asylum* (C. C. A. 1), 64 Fed. 325.

Federal court will not interfere by writ when petitioner is inmate of insane asylum, petition making no specific allegation as to sanity. *King v. McLean Asylum* (C. C. A. 1), 64 Fed. 331.

A petition which does not impeach the judgment or original mittimus, directed to the marshal, under which petitioner was actually committed, states no cause for the writ. *Howard v. United States* (C. C. A. 6), 75 Fed. 986, 34 L. R. A. 509.

It is not enough to allege that the petitioner is held by state authorities in violation of the Constitution of the United States. *In re Storti* (C. C.-Mass.), 109 Fed. 807. *Aff'd*. 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. 72.

The sections constituting the Habeas Corpus Act (8 F. C. A., Title 28, §§ 451 to 466; U. S. C. A., Title 28, §§ 451 to 466; id. U. S. C.) are one law, intended to govern the practice of the federal courts in such cases; such sections having relation to each other to constitute a complete, harmonious system. *Clifford v. Williams* (C. C.-Wash.), 131 Fed. 100.

The first question presented on application is whether the petition itself shows that the applicant is entitled to the writ, and if it does not, the application must be denied. *In re Dowd* (C. C.-Colo.), 133 Fed. 747.

The practice of applying for writs on loose, general allegations, which fail to show on the face of the petition that the petitioner is wrongfully detained, should be discontinued. *United States ex rel. Berger v. Uhl* (D. C.-N. Y.), 262 Fed. 226.

Where petition on its face shows that an appeal has not been taken and a ques-

tion of fact is involved, the application will be denied. *United States ex rel. Grau v. Uhl* (D. C.-N. Y.), 262 Fed. 532.

Where a petition shows on its face that petitioner has not exhausted the other remedies provided by law, his petition will be insufficient to authorize issuance of writ. *United States ex rel. Grau v. Uhl* (D. C.-N. Y.), 262 Fed. 532.

Before a court of the United States can issue a writ it should be made to appear that the application therefor is founded on some matter which justifies the exercise of federal authority. *United States ex rel. Caropa v. Curran* (C. C. A. 2), 297 Fed. 946, 36 A. L. R. 877.

Allegation in petition for writ by Indian sentenced under 7 F. C. A., Title 18, § 548; U. S. C. A., Title 18, § 548; *id.* U. S. C., as to jurisdiction of court, was mere conclusion of law. *Quagon v. Bidle* (C. C. A. 8), 5 Fed. (2d) 608.

Where one seeks discharge from confinement after conviction for an offense upon a petition for habeas corpus, the two questions presented are whether he was convicted by a court having jurisdiction of his person and the offense and whether the sentence pronounced was one within the power of the court to impose. *Cardigan v. Biddle* (C. C. A. 8), 10 Fed. (2d) 444; *McIntosh v. White* (C. C. A. 8), 21 Fed. (2d) 934; *Ownes v. Dancy* (C. C. A. 8), 36 Fed. (2d) 882. *Cert. den.* 281 U. S. 746, 74 L. ed. 1158, 50 Sup. Ct. 351; *Fenton v. Aderhold* (C. C. A. 5), 44 Fed. (2d) 787; *Saunders v. Lowry* (C. C. A. 5), 58 Fed. (2d) 158; *Schultz v. Zerbst* (C. C. A. 10), 73 Fed. (2d) 668; *Sansone v. Zerbst* (C. C. A. 10), 73 Fed. (2d) 670; *Belt v. Zerbst* (C. C. A. 8), 82 Fed. (2d) 18. *Cert. den.* 398 U. S. 667, 80 L. ed. 1391, 56 Sup. Ct. 835.

Petition must allege facts and not conclusions. *Cronin v. Ennis* (C. C. A. 8), 11 Fed. (2d) 237.

Motion to dismiss petition naming predecessor of warden of penitentiary instead of present warden to whom writ was directed was immaterial. *Barlos v. White* (C. C. A. 8), 27 Fed. (2d) 313.

Petition for writ to secure discharge of alien held for deportation should set forth the facts shown by the immigration records. *In re Tom Woo Chun* (D. C.-Cal.), 29 Fed. (2d) 760.

Petition contained no allegations of fact from which court could conclude there was any irregularity or omission in finding or presentation of indictment,

which could be availed of after verdict. *Wilson v. Aderhold* (C. C. A. 5), 84 Fed. (2d) 806.

The office of a writ of habeas corpus is to afford the petitioner a speedy and effective method of securing his release when illegally restrained and lies in all cases of illegal imprisonment, by commitment, detention, or restraint for whatever cause and under whatever pretense. *Clark v. Surprenant* (C. C. A. 9), 94 Fed. (2d) 969.

Petition denied where it specifically stated that petitioner was restrained of liberty in violation of 13th and 14th Amendments to Constitution when no facts were stated in petition to support the statement. *Ex parte Berman* (D. C.-Md.), 14 Fed. Supp. 716.

Allegations insufficient to show void sentence because of asserted disqualification of judge who imposed it. *Shore v. Splain*, 49 App. D. C. 6, 258 Fed. 150.

Copies of Invalid Process or Proceedings.

If the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the petitioner is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments or conclusions of law are necessarily inadequate. *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. 297; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. 304; *Craemer v. Washington*, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. 1; *Terlinden v. Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. 484; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. 760; *Haw Moy v. North* (C. C. A. 9), 183 Fed. 89.

Petition for the writ by one imprisoned under commitment of court was insufficient where no copies of the information, sentence, or final commitment were attached. *Cronin v. Ennis* (C. C. A. 8), 11 Fed. (2d) 237.

In seeking relief by writ from an order of deportation, the failure of applicant to accompany his petition with a copy of material parts of the evidence before immigration officers, was not excused by refusal of such officers to permit copy to be made, since there is ample provision made by statute for procuring a copy. *Ex parte Jew You On* (D. C.-Cal.), 16 Fed. (2d) 153.

Joinder of Petitioners.

Two or more persons, though held in custody for like causes, can not join in a petition for writ of habeas corpus, since each has no interest in the question of the legality or illegality of the imprisonment of the other. *In re Kosopud* (D. C.-Ohio), 272 Fed. 330.

Legal Conclusions Insufficient.

General allegations in a petition for writ of habeas corpus, constituting mere legal conclusions, are insufficient. *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. 297.

Mere allegations in a petition of the legal effect of evidence claimed to have been insufficient for petitioner's detention are not a proper foundation for issuing the writ. *In re Count De Toulouse Lautrec* (C. C. A. 7), 102 Fed. 878.

Statement in petition for writ that the sentence complained of, and under which petitioner was held, imposed a double penalty for one criminal act, was only the allegation of a legal conclusion and was insufficient as a foundation for the writ. *Cronin v. Ennis* (C. C. A. 8), 11 Fed. (2d) 237.

Particular Allegations.

Where application, though showing in whose custody and by virtue of what authority, the petitioner is detained, but sets forth the facts concerning his detention so far only as they are disclosed by the minutes, files and records of the District Court, is insufficient to authorize issuance of the writ. *Ex parte Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. 703.

Where a person was held in jail for safekeeping for the authorities of another state as an absconding debtor, and the deputy-marshal of the district held a warrant for the arrest and extradition of such person to a foreign country, the marshal was held to have sufficient interest to petition for possession of such person on habeas corpus. *In re Mineau* (C. C.-Vt.), 45 Fed. 188.

Petition alleging commitment to jail by judge of police court was sufficient. *In re Monroe* (C. C.-Ark.), 46 Fed. 52.

A petition for a writ to relieve petitioner from a deportation order was insufficient where it failed to allege a single fact showing that the board was without

jurisdiction to pass the order. *United States ex rel. Aronowicz v. Williams* (D. C.-N. Y.), 204 Fed. 844.

The allegations that appellant was given but the semblance of a hearing before immigration officer to determine whether he should be allowed to land, and that said hearing was not a fair and bona fide hearing, but that proceedings were conducted in an illegal and improper manner, and not in accordance with the acts of congress, were insufficient as not specifying wherein or in what respect appellant was denied a fair and impartial hearing. *Lee Leong v. United States* (C. C. A. 9), 217 Fed. 48.

Where complaint was made, in application for the writ to relieve from operation of an order of the board under Selective Draft Act of 1917, the petition was insufficient in failing to allege facts showing the board's lack of jurisdiction, and in alleging the conclusion that the board's action was "arbitrary." *In re Tinkoff* (D. C.-Ill.), 254 Fed. 222. *Aff'd*. 254 Fed. 225.

If the allegations of a petition are true or have any basis of fact, then the petitioner must state what he knows on knowledge, or what he has been informed and believes and must set forth the grounds and sources of his information and belief. *United States v. Uhl* (D. C.-N. Y.), 262 Fed. 532.

Petition by one held under an order of removal to another district for trial, failed to allege facts showing invalidity of the proceedings and was insufficient. *Sawyer v. United States* (C. C. A. 5), 4 Fed. (2d) 385.

Petitioner, sentenced on plea of guilty, alleging that the judge did so with knowledge that petitioner was insane at time of commission of the crime, and that the judge refused to assign counsel for him, stated sufficient facts to require issuance of the writ. *Hall v. Johnston* (C. C. A. 9), 91 Fed. (2d) 363.

Where petition for writ was based on contention that petitioner was entitled to liberty on the grounds that several sentences imposed upon him were to run concurrently and that the time had expired, an allegation in the petition that "in each case the court directed that the sentence was to take effect from and including the date upon which it was imposed," was a statement of fact and not an allegation of a mere legal conclusion. *Downey v. U. S.*, 67 App. D. C. 192, 91 Fed. (2d) 223

Signature and Verification.

It has been said that the fact that an application for a writ was not "signed by the person for whose relief it is intended," and the further fact that the petition did not show that it was at his instance and request, would justify the refusal of the writ. In *re Craig* (C. C.-Kans.), 70 Fed. 969.

Excuse for absence of signature of person whose relief writ is intended. In *re Chavez* (C. C.-Cal.), 72 Fed. 1006.

Notwithstanding 8 F. C. A., Title 28, § 454; U. S. C. A., Title 28, § 454; *id.* U. S. C. requiring the petition to be signed and verified by the person detained, it has been the practice of the courts to consider petitions signed and verified by others. In such cases, often for lack of time, or because of infancy, or incompetency, it would be impossible to present a petition signed and verified by the person detained, and the language of Title 28, § 460 plainly contemplates petitions so executed. *United States ex rel. Funaro v. Watchorn* (C. C.-N. Y.), 164 Fed. 152.

It is proper practice to make an application by one on behalf of another; but an application in this form entitles the petitioner to such relief only as might be given if the application were made by the person detained in his own name. *Ex parte Dostal* (D. C.-Ohio), 243 Fed. 664.

Petition may be filed by parent or guardian having a superior right to custody or control of a person illegally detained, when such person might not himself obtain relief. In similar cases, a parent or guardian has been permitted to obtain the discharge of a minor from military service or control, when the minor himself was not able to obtain such relief. *Ex parte Dostal* (D. C.-Ohio), 243 Fed. 664.

Petition signed and verified by next friend of detained person is an ancient and fully accepted practice, but the peti-

tion must show why the detained person does not sign and verify it. *United States ex rel. Bryant v. Houston* (C. C. A. 2), 273 Fed. 915.

Petition made for another, at the request of the detained person who, being in custody, was in peril of being removed from the jurisdiction of the court before he could act in person, was sufficient. *Collins v. Traeger* (C. C. A. 9), 27 Fed. (2d) 842.

It was never understood that at common law authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a writ, to inquire into the cause of his detention. So, where one petitioning for the release of one recruited into the army stated in her petition that she was the wife of the recruit, and dependent upon him for support, she was entitled to prosecute the proceedings. In *re Ferrens* (D. C.-N. Y.), Fed. Cas. No. 4746, 3 Ben. 442.

A person may petition the court for a writ to discharge another from custody. One judge said: "I should be very reluctant to give so narrow a construction of this act as will preclude from its benefits all persons who are by the circumstances of their restraint deprived of the opportunity of signing the petition, and where good cause is shown that the petition could not be signed. In *re Hoyle* (D. C.-Cal.), Fed. Cas. No. 6803.

The requirement that the application must be supported by oath was not complied with where purported oath was made before a justice of the peace in another state and there was no competent proof to show that such person was in fact a justice of the peace and, as such, authorized to administer oaths for the false swearing of which a prosecution for perjury would lie. In *re Keeler* (D. C.-Ark.), Fed. Cas. No. 7637, Hempst. 306.

786. Order Granting Writ.

(Caption.)

Read and considered. Let the writ issue as prayed, returnable before me at —, —, at — —. M. on the — day of —, 19—.

This the — day of —, 19—.

United States judge.

Filed in clerk's office
— — —, 19—.
— — —, Clerk,
By — — —, Deputy Clerk.

Cross-Reference.

In connection with Forms 786 to 798,
see notes to Form 785.

787. Writ of Habeas Corpus.

United States District Court
— — — District of — — —
— — — Division

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To — — — — —, Greeting:

You are hereby commanded, that the bod— of — — — by you restrained of his liberty, as it is said detained by whatsoever names the said — — — may be detained, together with the day and cause of — — — being taken and detained, you have before the Honorable — — —, Judge of the United States District Court in and for the — — — District of — — —, at the courtroom of said court, in the city of — — — at — — — M., on the — — — day of — — —, 19—, then and there to do, submit to and receive whatsoever the said judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable — — —, United States District Judge at — — — this — — — day of — — —, 19—.

Clerk.

By _____
Deputy clerk.

UNITED STATES MARSHAL'S RETURN

— — — District of — — —, ss:

Received the within writ the — — — day of — — —, 19—, and executed same.

United States marshal.

By _____
Deputy marshal.

Statutory References.

Allowance and direction of the writ, 8
F. C. A., Title 28, § 455; U. S. C. A.,
Title 28, § 455; id. U. S. C.

Power to issue, 8 F. C. A., Title 28,
§§ 451, 452; U. S. C. A., Title 28, §§ 451,
452; id. U. S. C.

NOTES TO DECISIONS

In General.

A document to be entitled to the name of writ must be issued by a court and be returnable to the court and must be under seal and tested by the proper officer. *Ex parte Craig* (C. C. A. 2), 282 Fed. 138. *Aff'd*. 263 U. S. 255, 68 L. ed. 293, 44 Sup. Ct. 103.

After a deported Chinaman has been placed aboard a vessel, he is in custody of the master of the ship and the writ must be served on such master. *Ex parte Yee Hick Ho* (D. C.-Cal.), 33 Fed. (2d) 360.

By all the forms, the writ is directed to the person detaining another, and commands the person to whom it is directed to produce the body of the prisoner, or person detained, together with the day and cause of his capture and detention, to submit to and receive whatever the court or judge awarding the writ may determine in that behalf. *Seavey v. Seymour* (C. C.-Mo.), Fed. Cas. No. 12596, 3 Cliff. 439.

788. Answer.

(Caption.)

Now comes the respondent in the above-entitled proceeding, and in obedience to said writ, produces the body of the petitioner at the time and place directed therein and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a commitment issued by the District Court of the United States for the — District of —, a copy of which is hereto attached and made a part of this response. Also attached hereto and made a part of this response is a copy of petitioner's conduct record sheet on file in the — Penitentiary.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

United States attorney.

Assistant United States attorney,
attorney for respondent.

Statutory References.

Form of return, 8 F. C. A., Title 28, § 457; U. S. C. A., Title 28, § 457; *id.* U. S. C.

Production of body 8 F. C. A., Title 28, § 458; U. S. C. A., Title 28, § 458; *id.* U. S. C.

Time for hearing, 8 F. C. A., Title 28, § 459; U. S. C. A., Title 28, § 459; *id.* U. S. C.

Time for return, 8 F. C. A., Title 28, § 456; U. S. C. A., Title 28, § 456; *id.* U. S. C.

NOTES TO DECISIONS

In General.

If, before the return could be made, or any other action could be taken, the restraint of which a petitioner complains would have terminated, leave to file petition for the writ will be denied. *In re Durrant*, 169 U. S. 39, 42 L. ed. 653, 18 Sup. Ct. 291; *Ex parte Baez*, 177 U. S. 378, 44 L. ed. 813, 20 Sup. Ct. 673.

The validity of petitioner's detention must be tested as of the date when the writ was served, and his arrest and detention under a second warrant issued after service of the writ can not be set forth in the return as justification of his detention. *In re Doo Woon* (D. C.-Ore.), 18 Fed. 898.

Where petitioner claimed the right to be discharged from imprisonment imposed by a police court for violation of a city ordinance, and set forth copy of the ordinance in his petition, it was not necessary that the return to the writ should also set forth the ordinance, and failure in that respect does not make the return demurrable. *In re Ah Toy* (C. C.-Cal.), 45 Fed. 795.

Return showing that the respondent is an officer of immigration under control of commissioner general in charge of port by designation of secretary of labor showed sufficient authority. *In re Moy Quong Shing* (D. C.-Vt.), 125 Fed. 641.

Facts alleged in return showed sufficient justification of detention of petitioner. *In re Jem Yuen* (D. C.-Mass.), 188 Fed. 350.

Mere return that alien was held under deportation warrant was insufficient. *United States ex rel. Bieloszzycka v. Immigration Comm.* (C. C. A. 2), 3 Fed. (2d) 551.

Return showing indictment and indorsement thereon, presumptively by the clerk, showing plea of guilty and sentence thereon, followed by commitment, and also a certificate of the clerk of the docket and minutes of record in his office, was sufficient to require remand of defendant to penitentiary. *Warden v. De Londi* (C. C. A. 10), 62 Fed. (2d) 981.

Writ directed to officers must be dismissed where petitioner is in custody of his bondsmen, and not in that of respondents. *In re Musci* (D. C.-N. Y.), 1 Fed. Supp. 587.

Where the writ was issued by federal court directed to army officer, a return showing and stating that the officer had disregarded the writ and permitted the petitioner to be removed out of the jurisdiction of the court in accordance with orders of the war department, was sufficient. *Ex parte Benedict* (D. C.-N. Y.), Fed. Cas. No. 1292.

It may be contempt for one falsely and evasively to return that he denies having control over the movements of the person alleged to be detained by him or that he knows of the whereabouts of such person. *United States ex rel. Wheeler v. Williamson* (D. C.-Pa.), Fed. Cas. No. 16725, 5 Clark 365.

Issues.

Where petitioner was held in custody by immigration officials, and in the return

to the writ the commissioner of immigration alleged that upon special inquiry the inspectors had decided that petitioner was subject to exclusion from the country as an alien "in accordance with department circular" of instructions, such return was insufficient to show that the inspectors arrived at their own decision upon facts disclosed by their inspection. *In re Kornmehl* (C. C.-N. Y.), 87 Fed. 314.

Where the return showed a state of facts under which the petitioner was being held in custody on an exclusion order, and the court discharged petitioner from custody without evidence controverting such facts, the court erred, and petitioner was remanded to custody. *Stretton v. Rudy* (C. C. A. 5), 176 Fed. 727.

A return setting forth only conclusions of law need not be traversed, and such return is insufficient to prevent granting of the writ. *Stretton v. Shaheen* (C. C. A. 5), 176 Fed. 735.

The only question that may be determined is whether the alien's detention on the return day of the writ was lawful. Anything done after that day is immaterial. *Ex parte Avakian* (D. C.-Mass.), 188 Fed. 688.

A supplemental return is supposed to contain only matters which have transpired since the filing of the original return. That is to say, the respondents justify the detention through the original and the supplemental returns. The two pleadings together constitute their defense. *Tiberg v. Warren* (C. C. A. 9), 192 Fed. 458.

Where relator was being detained by the immigration authorities, and his petition did not show that such authorities had failed to give him a fair hearing, and there was no traverse of the return, there was no issue for the court to try, since the return was conclusive unless traversed. *United States ex rel. D'Istria v. Day* (C. C. A. 2), 20 Fed. (2d) 302.

Where there is no traverse of the return, the question is one of law. *United States ex rel. Parenti v. Martineau* (D. C.-Conn.), 50 Fed. (2d) 902.

The issues are framed upon the return and denial without reference to the petition for the writ. *Jung Woon Kay v. Carr* (C. C. A. 9), 88 Fed. (2d) 297.

Alien was not entitled to release from immigration officials on ground return to writ did not certify the true cause of his detention, where the cause particularly appeared in the officer's supplemental re-

turn which was traversed. *Jung Woon Kay v. Carr* (C. C. A. 9), 88 Fed. (2d) 297.

Allegations in a petition for a writ of habeas corpus which are not denied in the return to the writ stand admitted. *Hammerer v. Huff*, — App. D. C. —, 110 Fed. (2d) 113.

Necessity of Producing Body.

It was not necessary, as part of the return, to produce the petitioner in court, where the return showed that such petitioner had been excluded from this country on the finding of a board that she was feeble-minded. *United States ex rel. Schleiter v. Williams* (D. C.-N. Y.), 203 Fed. 292.

Where writ is issued by a state court and served upon an officer of the United States for the discharge of a soldier held by such officer in the army, the officer is

not required to produce the body of such soldier on return of the writ, and if imprisoned by the state court for contempt, he may be released in habeas corpus proceedings in the federal court. *In re Neill* (D. C.-N. Y.), Fed. Cas. No. 10089, 8 Blatchf. 156, citing *In re Farrand* (D. C.-Ky.), Fed. Cas. No. 4678, 1 Abb. U. S. 140; *Ex parte Jenkins* (C. C.-Pa.), Fed. Cas. No. 7259, 2 Wall. Jr. 521; *Ex parte Robinson* (C. C.-Ohio), Fed. Cas. No. 11935, 6 McLean 355; *Ex parte Sifford* (D. C.-Ohio), Fed. Cas. No. 12848.

A return which is evasive, and does not deny that the prisoner is in the power and control of the one to whom the writ is directed, and does not aver that he is unable to produce the petitioner, is insufficient. *United States v. Davis* (C. C.-D. C.), Fed. Cas. No. 14926, 5 Cranch C. C. 622.

789. Petition for Writ of Habeas Corpus in Deportation Proceeding.

District Court of the United States

———— District of ———

United States ex rel. —,	} Relator,	
v.		
—, District Director, Immigration and Naturalization, Ellis Island, New York,		No. —.
	} Respondent.	

To the Honorable Judges of the District Court of the United States,
— District of —:

Your petitioner, NF, for his petition for a writ of habeas corpus, respectfully shows:

1. That he was born in —, —, in 18—.
2. That on or about — —, 19—, petitioner, under the name of MA, applied at the American Consulate, at —, —, for a quota immigration visa, and there was issued to your petitioner under the name of MA preference quota immigration visa No. — on — —, 19—.
3. That thereafter, and on — —, 19—, your petitioner arrived as a passenger on the S. S. — at the port of —, and after being inspected by immigration officials was admitted to the United States for permanent residence under the name of MA.
4. That your petitioner has resided in the United States since his arrival, to wit, — —, 19—.

5. That on or about — —, 19—, your petitioner was taken into custody under a warrant of arrest, issued by the Attorney General, dated — —, 19—.

6. That your petitioner was accorded a hearing under said warrant of arrest, and on the — day of —, 19—, the Attorney General signed a warrant for the deportation of your petitioner, the said warrant containing the following: "Whereas from proofs submitted to me, Attorney General, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien NF or NFJ, alias MA who entered the United States at —, —, ex S. S. —, on the — day of —, 19—, is subject to deportation under section 19 of the Immigration Act of February 5th, 1917, being subject thereto under the following provisions of the laws of the United States, to wit: The Act of 1924, in that he is found to have been at the time of entry not entitled under said act to enter the United States for the reason, to wit: That the immigration visa he presented was not valid because procured by fraud or misrepresentation."

7. That your petitioner has been informed and verily believes that for said alleged violation of the Act of 1917, the statute of limitations had already expired before the warrant of arrest was issued herein.

8. That there is no evidence before the Department of Justice upon which it based or could have based its findings and conclusions in accordance with which the warrant for deportation was issued, to wit, that your petitioner entered the United States at the port of — ex S. S. — on — —, 19—.

9. That the said warrant of deportation, aforementioned, is fatally defective in not stating which particular provision of the said Act of 1924 your petitioner is charged to have violated.

10. That the Department of Justice has heretofore ruled that the mere obtaining of a preference in the issuance of a quota visa is not a deportable offense.

11. That your petitioner was in all respects admissible under the immigration laws and rules promulgated thereunder as a quota immigrant.

12. That the Department of Justice is without authority to cancel or annul an immigration visa issued by the department of state.

13. That the Department of State has not canceled or annulled preference immigration quota visa — issued to your petitioner at the American Consulate in —, —, on — —, 19—.

14. That nowhere under any immigration act or rule or regulation made thereunder is fraud or misrepresentation, in securing a preference in the issuance of a quota visa, made a deportable offense.

15. That the warrant of arrest and the warrant of deportation issued herein are without authority of law; the proceedings thereunder were unfair and the findings and conclusions are not based on any evidence adduced at the hearings or otherwise.

16. That notwithstanding all of the foregoing, the Attorney General has issued a warrant for the deportation of your petitioner to —, and

your petitioner is now illegally detained, imprisoned, and restrained of his liberty by the respondent at — Island, — Harbor, within the jurisdiction of this honorable court,

Wherefore, your petitioner respectfully prays that a writ of habeas corpus issue herein, requiring the respondent to produce before this honorable court his body together with the cause of his detention to receive and abide by such order as may be made herein.

Date—.

Petitioner.

Source of Form.

From record in United States ex rel.
Fink v. Reimer, 305 U. S. 618, 83 L. ed.
395, 59 Sup. Ct. 78.

NOTES TO DECISIONS

Deportation Cases.

Cases where release sought in exclusion of aliens. Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. 734; Ex parte Yabucanin (D. C.-Mont.), 199 Fed. 365; United States ex rel. Aronowicz v. Williams (D. C.-N. Y.), 204 Fed. 844; Ex parte Domenici (D. C.-Mass.), 8 Fed. (2d) 366. Affd. 10 Fed. (2d) 433.

Where a warrant of deportation was shown by petition for writ to have been defective in that it did not name the country from which the petitioner had originated, or the country to which he was to be deported, he was entitled to release. Ex parte Yabucanin (D. C.-Mont.), 199 Fed. 365.

790. Order Dismissing Writ of Habeas Corpus in Deportation Proceeding.

United States of America ex rel.

—,

Relator,

v.

—, District Director, Immigration
and Naturalization, — Island,

—,

Respondent.

No. —.

The relator above-named having moved this court for a writ of habeas corpus, and said application having duly come on to be heard before the undersigned on the — day of —, 19—, and after hearing —, Esq., for the relator, and LH, United States attorney for the — District of —, by HC, Special Assistant United States Attorney, for the respondent, and due deliberation having been had thereon and the court having filed its opinion herein, it is

Ordered, that the aforesaid writ of habeas corpus be and the same hereby is dismissed; and it is

Further ordered, that the alien be, and he hereby is remanded to the custody of the District Director, Immigration and Naturalization at — Island, —, and it is

Further ordered, that the said District Director, Immigration and Naturalization be stayed for a period of — days from the entry of this order from proceeding with the deportation of the said alien.

Filed —.

United States district judge.

Source of Form.

From record in United States ex rel.
Fink v. Reimer, 305 U. S. 618, 83 L. ed.
395, 59 Sup. Ct. 78.

Cross-Reference.

See notes to Form 788.

791. Petition for Writ of Habeas Corpus ad Prosequendum.

District Court of the United States

for the District of —

United States of America,

Plaintiff,

v.

Defendant.

No. —

Petition for a Writ of Habeas
Corpus ad Prosequendum

Your petitioner, the United States of America, by —, United States attorney for the District of — respectfully shows:

1. An indictment was returned during the — Term, 19—, and on or about the — day of —, 19—, by the grand jury for the District of —, charging —, the defendant above-named, with a violation of U. S. C., Title 15, section 77q, Title 18, sections 88, 338.

2. Said defendant has not been arraigned on the above-mentioned indictment nor has said defendant pleaded to said indictment.

3. Said defendant, —, is imprisoned in the United States — Penitentiary at —, —.

4. That — is an attorney in —, —, and is the attorney for said defendant in the above-entitled case; that said attorney for the defendant has requested that the defendant — be produced at —, — before the United States District Court in order that said defendant may enter a plea of guilty to the above-mentioned indictment.

5. That this honorable court has set the time for said defendant to enter his plea on — —, 19—, at — —. M.

Wherefore, petitioner prays that the clerk of this court be instructed to issue a writ of habeas corpus ad prosequendum to the warden of the United States — Penitentiary at —, —, and the United States marshal for the — District of — to bring the said — before this court to make his plea to said indictment and to be returned to the warden of the United States — Penitentiary at —, —, as soon as said plea is disposed of.

United States attorney.

792. Order Directing Issuance of Writ of Habeas Corpus ad Prosequendum.

(To be directed to Warden of Federal Institution.)

District Court of the United States

for the District of _____

United States of America,

Plaintiff,

v.

_____,

Defendants.

No. _____

Order

On the petition of the United States of America by _____, United States Attorney for the District of _____, and good cause appearing:

It is ordered that the clerk of this court be and hereby is instructed to issue a writ of habeas corpus ad prosequendum to the warden of the United States _____ Penitentiary at _____, _____, and the United States marshal for the _____ District of _____ to bring _____ before this court on the _____ day of _____, 19____, at _____ M. to make his plea in the above-entitled cause and to be returned to said United States _____ Penitentiary at _____, _____, as soon as the case is disposed of.

Date_____.

United States district judge.

Cross-Reference.

In connection with Forms 793, 794, see notes to Forms 787, 788.

793. Writ of Habeas Corpus ad Prosequendum.

(Directed to warden of federal institution.)

District Court of the United States

for the District of _____

United States of America,

Plaintiff,

v.

_____,

Defendants.

No. _____

Writ of Habeas Corpus
ad Prosequendum

The President of the United States of America to _____, Warden of the United States _____ Penitentiary, _____, _____, or his assistant, and _____, United States marshal for the _____ District of _____, Greeting:

We command that you have the body of _____ detained in the United States _____ Penitentiary at _____, _____, under your custody, as it is said,

under safe and secure conduct before the judge of the District Court within and for the District of — at —, —, on — —, 19—, at — —. M., there to be arraigned on a certain indictment now pending in said court against him, and to then and there make his plea to said indictment and charge before the said court, and immediately after the said plea shall have been disposed of in the above-entitled matter, that you return him to the said United States — Penitentiary at —, —, under safe and secure conduct, and have you then and there this writ.

Witness the Honorable —, Judge of the District Court of the United States for the District of — at —, — and the seal of said court, this — day of —, 19—.

United States district judge.

794. Writ of Habeas Corpus ad Prosequendum.

(Addressed to warden of state institution.)

District Court of the United States of America

For the ——— District of ———

——— Division

United States of America }
v. }
_____ }

D. C. No. —

WRIT OF HABEAS CORPUS AD PROSEQUENDUM

To: Honorable —, Warden,
—— State Penitentiary,
——, —.

Greeting:

We command you that you do forthwith deliver and turn over to —, United States marshal for the — District of —, the body of the said — who is now detained and imprisoned in the — State Penitentiary at —, —, and who is a defendant in the above-entitled cause, in which said cause the said — was charged with a violation of U. S. C., Title 18, sections 408a and 408b, that is to say, the said defendant, — did, on, to wit, — —, 19—, seize, kidnap, abduct, and transport a person, to wit, one — in interstate commerce, and that on the — day of —, 19—, the grand jury for the — District of — returned an indictment, D. C. No. —, charging the said — with seizing, kidnaping, abducting, and transporting a person, to wit, one —, in interstate commerce; and that at the termination of said cause, said — be returned at the expense

of the United States government to you at the — State Penitentiary located at —, —, under safe and secure conduct.

And have you then and there this writ.

To the marshal of the — District of — to execute.

Witness the Honorable —, Judge of the District Court of the United States for the — District of —, — Division, this — day of —, 19—.

Clerk.

795. Petition for a Writ of Habeas Corpus ad Testificandum.

(Caption.)

The petition of the United States by — United States attorney for the — District of — respectfully shows:

1. That John Doe is confined as a prisoner in the [name of institution] at —, in the custody of —, Warden of said —, having been convicted of an offense against the laws of the United States and on — —, 19— sentenced by the Honorable —, Judge of the District Court of the United States for the — District of —, to imprisonment in a [type of institution] for — years from — —, 19—, by virtue of which the said John Doe is now detained in said —.

2. That the said John Doe is a material witness on behalf of the plaintiff in an action now pending in the District Court of the United States for the — District of — in which petitioner is plaintiff and — is defendant and that said cause is set for trial on the — day of —, 19—.

Wherefore, petitioner prays that a writ of habeas corpus ad testificandum issue from this court to — Warden of the —, requiring him to produce the body of the said John Doe before this court on said — day of —, 19—, to testify on behalf of the plaintiff in said action.

United States attorney.

796. Writ of Habeas Corpus ad Testificandum.

District Court of the United States

— District of —

— Division

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To: —, Warden.

Greeting:

You are hereby commanded to have the body of John Doe, detained in [name of institution] under your custody, as it is said, before the Honorable —, Judge of the United States District Court in and for the — District of —, at the courtroom of said court in the city of —, —,

at — M. on the — day of —, 19—, then and there to testify in an action now pending in said court, in which — is plaintiff and — is defendant, and immediately after the said — shall have given his testimony in the said action, that you return him to the [name of institution] under safe conduct, and have you then and there this writ.

Witness the Honorable —, United States District Judge at —, —, this — day of —, 19—.

Clerk.

By _____
Deputy clerk.

Cross-Reference.

See notes to Forms 787, 788.

797. Petition for Writ of Habeas Corpus in Removal Proceedings.

District Court of the United States

_____ District of _____

AB,

Plaintiff,

v.

CD, as United States marshal for
the — District of —,

Defendant.

No. —.

To the honorable judges of the District Court of the United States for the — District of —.

The petition of AB respectfully shows:

1. That petitioner is a resident of — in the state of — and is a citizen of said state and of the United States of America.

2. That petitioner is now imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of — United States marshal for the — District of — at the city of — in the said district.

3. That the sole authority by virtue of which petitioner is being imprisoned and detained is a certain paper which purports to be a warrant of removal made by the Honorable —, Judge of the District Court of the United States for the — District of —, and dated — —, 19—, ordering the removal of petitioner from the said — District of — to the — Division of the — District of —, a copy of which is hereto annexed and marked for identification as Petitioner's "Exhibit A."

4. That upon information and belief the said warrant of removal was made by virtue of a certain commitment issued by — United States Commissioner based on certain indictment found against petitioner in the proceedings entitled "United States v. AB, No. —, in the District Court of the United States for the — District of —, — Division," charging petitioner with violation of U. S. C., Title 18, section — with reference

to using the mails to defraud, a copy of which indictment is annexed hereto and marked for identification as "Petitioner's Exhibit B."

5. That the petitioner did not commit the crime of using the mails to defraud as is attempted to be charged in the indictment.

6. That said indictment is void and your petitioner's detention is illegal and in denial of his rights under the Constitution of the United States because:

a. Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner with the commission of any crime or offense against the United States or any law thereof within the — Division of the — District of —.

b. If it charges any offense against the laws of the United States and petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by petitioner within the — District of — and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of his rights under section two of article three thereof.

c. Said indictment does not charge any offense at all and, if any, none within the jurisdiction of the court to which said indictment was returned, since such offense as may be found to be charged in the indictment is charged to have been committed in the — District of —, whereas the indictment was returned at — and by a grand jury sitting in and for the — District of —.

7. The said warrant of removal is for these and other reasons, absolutely void and your petitioner is now confined and deprived of his liberty in violation of the Constitution of the United States and in violation of the statutes of the United States, and will, if the writ herein prayed for be denied, be under color of said void indictment and commitment, removed to the — District of —, or be compelled to enter into security for his appearance there.

Wherefore, petitioner prays that a writ of habeas corpus may issue directed to the said —, United States Marshal for the — District of —, requiring him to bring and have your petitioner before this court at a time to be by this court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had and that this court may proceed in a summary way to determine the facts of this case in that regard and the legality of your petitioner's imprisonment, restraint, and detention and thereupon to dispose of your petitioner as law and justice may require.

Attorney for petitioner.

(Verification.)

Source of Form.

Adapted from record in *Salinger v. Loisel*, 265 U. S. 224, 68 L. ed. 989, 44 Sup. Ct. 519.

NOTES TO DECISIONS

In General.

Where complaint did not show that the act complained of was done by an officer of the United States in his official capacity, cause was not removable. *Mayo v. Dockery* (C. C.-N. Car.), 108 Fed. 897.

Insufficient disclosure in first petition did not preclude amendment. *Maryland v. Ford* (D. C.-Md.), 12 Fed. (2d) 289.

Petition for removal showing that defendant, a prohibition agent, went to a

farm to make a seizure of liquors, and that prosecution under the state law arose out of such act, showed ground for removal. *Rhode Island v. Richardson* (D. C.-R. I.), 32 Fed. (2d) 301.

Deputy clerk was not empowered to issue writ of habeas corpus cum causa without an order of court when the court was in session. *In re Keene* (D. C.-Tex.), 6 Fed. Supp. 308.

798. Order Issuing Writ of Habeas Corpus.

(Caption.)

Now on this — day of —, 19—, the above matter coming on upon the petition for the issuance of a writ of habeas corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this court at — —. M. of the — day of —, 19—.

United States district judge.

Source of Form.

Adapted from record in *Salinger v. Loisel*, 265 U. S. 224, 68 L. ed. 989, 44 Sup. Ct. 519.

Cross-Reference.

See notes to Forms 787, 788, 797.

CHAPTER 24

BANKRUPTCY

Form

- 805. Debtor's petition.
- 806. Statement of affairs for bankrupt or debtor not engaged in business.
- 807. Statement of affairs for bankrupt or debtor engaged in business.
- 808. Partnership petition.
- 809. Creditors' petition.
- 810. Subpoena to alleged bankrupt.
- 811. Answer of alleged bankrupt.
- 812. Petition for appointment of receiver.
- 813. Bond of applicant for a receiver or marshal.
- 814. Order appointing receiver.
- 815. Petition for appointment of ancillary receiver.
- 816. Order appointing ancillary receiver.
- 817. Petition by receiver for leave to appoint attorney.
- 818. Order authorizing receiver to retain counsel.
- 819. Petition for allowance by attorney for receiver.
- 820. Counterbond to receiver or marshal.
- 821. Petition in reclamation proceedings.
- 822. Order granting reclamation.
- 823. Report of receiver.
- 824. Adjudication that debtor is not a bankrupt.
- 825. Adjudication of bankruptcy.
- 826. Appointment and oath of appraiser.
- 827. Order of general reference.
- 828. Order of reference in judge's absence.
- 829. Referee's oath of office.
- 830. Bond of referee.
- 831. Notice of first meeting of creditors.
- 832. Power of attorney.
- 833. Special power of attorney.
- 834. Order approving appointment of trustee.
- 835. Appointment of trustee by referee.
- 836. Notice to trustee of his appointment.
- 837. Bond of receiver or trustee.
- 838. Order approving trustee's bond.

Form

- 839. Motion for order to turn over property.
- 840. Turn over order.
- 841. Petition for turn over order.
- 842. Order to show cause on petition for turn over order.
- 843. Order to third person to turn over property.
- 844. Order that no trustee be appointed.
- 845. Order for examination of bankrupt.
- 846. Subpoena to witness.
- 847. Proof of claim by individual.
- 848. Proof of claim by corporation.
- 849. Proof of claim by partnership.
- 850. Proof of claim by agent or attorney.
- 851. Affidavit of loss of negotiable instrument.
- 852. Order expunging or reducing claim.
- 853. Order for payment of dividends.
- 854. Petition for sale of real estate.
- 855. Order for sale of real estate.
- 856. Petition for redemption of property.
- 857. Order for redemption of property.
- 858. Trustee's report of exempt property.
- 859. Report of trustee in no asset case.
- 860. Petition for discharge.
- 861. Order fixing time for filing objections to discharge.
- 862. Notice of order fixing time for filing objections to discharge.
- 863. Specification of objections to discharge.
- 864. Discharge of bankrupt.
- 865. Referee's cash book.
- 866. Referee's financial statement.
- 867. Original petition in proceedings under chapter XI.
- 868. Notice of meeting of creditors in proceedings under chapter XI.
- 869. Application for confirmation of an arrangement under chapter XI.
- 870. Order confirming an arrangement under chapter XI. (Where all affected creditors have accepted.)

Form	Form
871. Order confirming an arrangement under chapter XI. (Where less than all affected creditors have accepted.)	883. Order approving debtor's petition in proceedings under section 75.
872. Original petition in proceedings under chapter XII.	884. Order of reference in proceedings under section 75.
873. Notice of meeting of creditors in proceedings under chapter XII.	885. Bond of conciliation commissioner.
874. Application for confirmation of an arrangement under chapter XII.	886. Notice of first meeting of creditors in proceedings under section 75.
875. Order confirming an arrangement under chapter XII. (Where all affected creditors have accepted.)	887. Application for confirmation of a composition or extension proposal under section 75.
876. Order confirming an arrangement under chapter XII. (Where less than all affected creditors have accepted.)	888. Order confirming a composition or extension proposal under section 75.
877. Original petition in proceedings under chapter XIII.	889. Petition for corporate reorganization (Under former section 77 B).
878. Notice of meeting of creditors in proceedings under chapter XIII.	890. Answer and contravention by a secured creditor (Under former section 77 B).
879. Application for confirmation of an arrangement under chapter XIII.	891. Order confirming plan of reorganization (Under former section 77 B).
880. Order confirming a plan under chapter XIII. (Where all affected creditors have accepted.)	892. Voluntary petition for corporate reorganization under chapter X.
881. Order confirming a plan under chapter XIII. (Where less than all affected creditors have accepted.)	893. Order approving filing of voluntary petition under chapter X.
882. Debtor's petition in proceedings under section 75 of the Bankruptcy Act.	894. Involuntary petition for corporate reorganization under chapter X.
	895. Answer to involuntary petition for corporate reorganization under chapter X.

INTRODUCTION.—Article 1, § 8, cl. 4 of the United States Constitution confers upon Congress the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

The Rules of Civil Procedure for the District Courts of the United States do not govern proceedings in bankruptcy, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court. Rule 81 (a) (1). On January 16, 1939, that court adopted general orders in bankruptcy, effective February 13, 1939. Number 37 of these orders provides:

"In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

GENERAL ORDERS IN BANKRUPTCY

ANALYSIS OF GENERAL ORDERS AMENDED AND PROMULGATED BY THE SUPREME COURT
JANUARY 16, 1939

EFFECTIVE FEBRUARY 13, 1939

Order

1. Docket.
2. Filing of papers.
3. Process.
4. Conduct of proceedings.
5. Form of petitions and other papers.
6. Petitions in different courts.
7. Priority of petitions.
8. Proceedings in partnership cases.
(Abrogated, May 25, 1925, 268 U. S. 712, 69 L. ed. 1178.)
9. List of creditors in involuntary bankruptcy.
10. Indemnity for expenses.
11. Amendments.
12. Duties of referee.
13. Appointment and removal of trustee.
(Abrogated.)
14. No official or general trustee.
15. Trustee not appointed in certain cases.
16. Notice to trustee of his appointment.
17. Duties of trustee.
18. Sale of property.
19. Accounts of marshal.
20. Papers filed after reference.
21. Proofs of claim.
22. Taking of testimony.
23. Orders of referee.
24. List of proved claims and interests.
25. Special meeting of creditors.
26. Accounts of referee.
27. Review by judge. (Abrogated.)
28. Redemption of property and compounding of claims.
29. Payment of moneys deposited.
30. Imprisoned debtor.
31. Petition for discharge.
32. Opposition to discharge.
33. Arbitration and compromise.

Order

34. Costs in contested proceedings.
35. Compensation of clerks, referees, receivers and trustees.
36. Appeals.
37. General provisions.
38. Forms.
39. Representation of creditors by receivers or their attorneys.
40. Receivers and marshals as custodians.
41. Waiver of right to share in deposits or in payments under an arrangement or plan.
42. Compensation of attorneys.
43. Fees and expenses of attorneys for petitioning creditors.
44. Appointment of attorneys.
45. Auctioneers, accountants and appraisers.
46. Banking institution as custodian, receiver or trustee. (Abrogated.)
47. Reports of referees and special masters.
48. Proceedings under chapter XI of the Act [11:701 to 799].
49. Proceedings under section 77 of the Act [11:205].
50. Proceedings under section 75 of the Act [11:203].
51. Ancillary receiverships limited.
52. Proceedings under chapter X of the Act [11:501 to 676].
53. Bond of designated depository under section 61 [11:101].
54. Proceedings under chapter XII of the Act [11:801 to 926].
55. Proceedings under chapter XIII of the Act [11:1001 to 1086].
56. Rules by courts of bankruptcy.

[Bracketed numbers refer to the title and section numbers of the Bankruptcy Law as compiled in the United States Code, the Federal Code Annotated, and the United States Code Annotated.]

Order

It is ordered, on this 16th day of January, 1939, that General Orders XIII, XXVII and XLVI of the General Orders in Bankruptcy, and Forms Nos. 4, 7, 8, 19, 29, 32, 36, 39, 41, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 60, 61, 62, 63, 64, 66, 70, 72 and 73 of the Forms in Bankruptcy, be, and they hereby are, abrogated.

It is further ordered that the General Orders and Forms in Bankruptcy be, and they hereby are, amended and established to read as hereinafter set forth.

It is further ordered that this order shall take effect on Monday, February 13, 1939, and shall govern all proceedings then pending to which its provisions are

applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply: Provided, That the General Orders and Forms in Bankruptcy heretofore established shall apply to proceedings pending under sections 12, 73 and 74, as amended [11:30, 201, 202], of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898.

No. 1. Docket.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon; of the reference of the case, if any reference is made, to the referee; of the transmission by the referee to the clerk of all bonds, orders and reports, and of the referee's certified record of the proceedings; and of all proceedings in the case except those duly entered on the referee's certified record. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection. If the proceeding is brought under section 75 or 77 [11:203, 205], or under chapter IX, X, XI, XII, or XIII, of the Act [11:401 to 1086], the docket shall so indicate.

No. 2. Filing of papers.

The clerk or the referee shall indorse on each paper filed with him the day, and in the case of the original petition, the day and hour, of filing.

No. 3. Process.

All process, summonses, and subpoenas, except such as are issued by the Interstate Commerce Commission in the performance of its duties under section 77 of the Act [11:205], shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

No. 4. Conduct of proceedings.

Proceedings may be conducted by the bankrupt or debtor in person in his own behalf, or by a creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the district court. The name of the attorney or counselor, with his business address, shall be entered upon the docket, with the date of the entry. Orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the Act or by these general orders, required to be served on the party personally may be served upon his attorney.

No. 5. Form of petitions and other papers.

(1) All petitions and schedules shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

(2) Petitioners in involuntary proceedings for adjudication, whose claims rest upon assignment or transfer from other persons, shall annex to one of the triplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings.

(3) Each paper filed shall contain a caption setting forth the name of the court, the title of the proceeding, the docket number, and a brief statement of the character of the paper.

(4) Proceedings shall be entitled "In Bankruptcy," "In Proceedings for a Composition or Extension," "In Proceedings for the Reorganization of a Railroad," "In Proceedings for a Composition by a Public Debtor," "In Proceedings for the Reorganization of a Corporation," "In Proceedings for an Arrangement," "In Proceedings for a Real Property Arrangement," or "In Proceedings for a Wage Earner Plan," as the case may be.

(5) In proceedings under chapter VIII, X, XI, XII, or XIII, of the Act [11:201 to 303, 501 to 1086], unless and until the debtor is adjudicated a bankrupt he shall be referred to as a "debtor." In proceedings under chapter IX [11:401 to 404], the debtor shall be referred to as the "petitioner."

No. 6. Petitions in different courts.

If two or more petitions are filed by or against the same person or by or against different members of a partnership in different courts of bankruptcy, each of which has jurisdiction, the court first acquiring jurisdiction shall, upon application by any party in interest and after a hearing upon reasonable notice to parties in interest, determine the court in which the cases can proceed with the greatest convenience to parties in interest, and the proceedings upon the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. If the court first acquiring jurisdiction determines that it shall hear the cases, it shall make its order to that effect, and other courts in which petitions have been filed, upon exhibition of a certified copy of such order, shall order the cases before them transferred to the court first acquiring jurisdiction. If the court first acquiring jurisdiction determines that the cases shall be heard by another court, it shall make its order to that effect and that the case before it be transferred to such court; and other courts in which petitions have been filed, upon exhibition of a certified copy of such order, shall order the cases before them transferred to the court named in the order of the court first acquiring jurisdiction.

No. 7. Priority of petitions.

If two or more petitions are filed in the same court against the same person, and the debtor appears and shows cause against an adjudication of bankruptcy on the petitions, the petitions shall be heard and tried in the order of their filing: Provided, That the court, in its discretion, may order the proceedings consolidated.

No. 8. Proceedings in partnership cases. (Abrogated, May 25, 1925, 268 U. S. 712, 69 L. ed. 1178.)

No. 9. List of creditors in involuntary bankruptcy.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a list of the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor.

No. 10. Indemnity for expenses.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt, debtor, or other person shall be repaid him out of the estate as part of the cost of administering the same.

No. 11. Amendments.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules, and filed in triplicate. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

No. 12. Duties of referee.

(1) A copy of the order referring a proceeding to a referee shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee; and the bankrupt or debtor may receive from the referee a

protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of an arrangement or plan.

(2) The times when and places where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the Act to perform.

(3) If a bankrupt files the list of creditors in advance of his schedules, the referee shall promptly call the first meeting of creditors without awaiting the filing of schedules.

(4) The referee, except in no asset cases, shall mail a summary of the trustee's final report and account to the creditors with the notice of the final meeting, together with a statement of the amount of claims proved and allowed.

No. 13. Appointment and removal of trustee. (Abrogated.)

No. 14. No official or general trustee.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

No. 15. Trustee not appointed in certain cases.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

No. 16. Notice to trustee of his appointment.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

No. 17. Duties of trustee.

(1) The trustee shall, immediately upon entering upon his duties, send notice by mail to the Commissioner of Internal Revenue, Washington, D. C., of the adjudication of bankruptcy, and prepare a complete inventory of all the property of the bankrupt or debtor that comes into his possession.

(2) The trustee shall make report to the court, within five days after receiving the notice of his appointment, unless further time is granted by the court, of the articles set off to the bankrupt or debtor by him, according to the provisions of section 47 of the Act [11:75], with the estimated value of each article; and any creditor or the bankrupt or debtor may file objections to the determination of the trustee within ten days after the filing of the report, unless further time is granted by the court.

(3) In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the Act or by these general orders, within five days after the same shall be due, it shall be the duty of the court to make an order requiring the trustee to show cause, at a time specified in the order, why he should not be removed from office. The court shall cause a copy of the order to be served upon the trustee at least three days before the time fixed for the hearing.

(4) All accounts of trustees and receivers shall be referred as of course to the referee for audit, unless otherwise specially ordered by the judge.

No. 18. Sale of property.

(1) All sales shall be by public auction unless otherwise ordered by the court. Where the property is sold by an auctioneer he shall, upon completion of the sale, file with the court and also furnish the receiver or trustee an itemized state-

ment of the property sold, the name of each purchaser, and the price received for each item or lot, or for the property as a whole if it is sold in bulk.

(2) Upon application to the court, and for good cause shown, the receiver or trustee may be authorized to sell the property of the estate or any specified portion thereof at private sale; in which case he shall keep an accurate and itemized account of all property sold, of the price received therefor, and to whom sold; which account he shall forthwith file with the court.

No. 19. Accounts of marshal.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

No. 20. Papers filed after reference.

Proofs of claim and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

No. 21. Proofs of claim.

(1) A proof of claim against an estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership it shall state that the deponent is a member of the partnership; when made by an agent, it shall state the reason the proof is not made by the claimant in person; and when made to prove a debt due to a corporation, the proof shall be made by a duly authorized officer of the corporation. A proof of claim for a debt founded upon an open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which no interest shall be allowed. Each such proof of claim shall state whether a note or other negotiable instrument has been received for such account or any part thereof, or whether any judgment has been rendered thereon. If a note or other negotiable instrument has been received, it shall be filed with the proof of claim. Proofs of claim received by any trustee shall be delivered to the referee to whom the cause is referred.

(2) Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at a designated address; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed. In other cases notices shall be addressed to each creditor at the place designated in the proof of claim, or, if no proof of claim has been filed or if filed and no address is therein stated, at the place shown in the list of creditors.

(3) If a claim has been assigned after the commencement of the proceedings but before proof of claim has been filed, the proof of claim therefor shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim, proof of which has been filed, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment and that objection thereto must be made within ten days. If no objection be made within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

(4) The claims of persons contingently liable for the bankrupt or debtor may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.

(5) The execution of any power of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before any of

the officers enumerated in section 20 of the Act [11:43]. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

(6) When the trustee or any creditor or the bankrupt or debtor shall desire the reconsideration of any claim allowed against the estate, he may apply by petition to the referee to whom the case is referred for an order for such reconsideration, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

No. 22. Taking of testimony.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and shall be governed by the Rules of Civil Procedure for the District Courts of the United States, in so far as they are not inconsistent with the Act or with these general orders. The referee may rule upon the admissibility of evidence and may put witnesses on oath and may himself examine them and may call any party to the proceedings and examine him under oath. If an objection to a question propounded to a witness is sustained by the referee, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The referee may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. Upon the request of any party, however, the referee shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

No. 23. Orders of referee.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

No. 24. List of proved claims and interests.

The person with whom proofs of claim or of interest are filed shall maintain open to inspection a list of the claims and interests proved against the estate, with the names and addresses of the owners thereof, as given by them.

No. 25. Special meeting of creditors.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the Act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

No. 26. Accounts of referee.

Every referee shall maintain, substantially in the manner indicated by Form No. 46, a cash book or a record in which he shall keep an accurate and itemized account showing (1) his receipts of moneys as indemnity or charges for expenses, and as compensation for his services, and the case number of the proceeding to which each receipt is credited; and (2) the disposition made of such moneys, showing the case number of the proceeding, if any, on account of which each sum is expended. All moneys received as aforesaid shall be deposited forthwith to the credit of the referee in his official capacity in a depository designated by the court for the purpose, and shall be disbursed only by checks signed by the referee in his official capacity. Within sixty days after the expiration of each six months

period ending June thirtieth and December thirty-first of each year, each referee shall submit to the district court (1) a financial statement containing the information indicated by Form No. 47; (2) if the referee devotes part time to his duties, a statement showing the extent to which and the method by which any overhead expenses have been allocated to and reimbursed out of the aforesaid funds; (3) a copy of the rule or a statement of the method by which the amount of the indemnity or expense charges against individual estates is computed or fixed; (4) a statement containing an inventory of law books, office equipment and other property acquired under the provisions of subdivision b of section 62 of the Act [11:102]; and (5) a list of the proceedings referred to him which have remained open for more than eighteen months, giving the reasons in each instance why they have not been closed. The statements so submitted shall be in duplicate and verified; and one copy shall be transmitted by the clerk, forthwith upon its receipt, to the Attorney General.

No. 27. Review by judge. (Abrogated.)

No. 28. Redemption of property and compounding of claims.

Whenever it may be deemed for the benefit of an estate to redeem and discharge any mortgage, pledge, deposit or lien, upon any property, real or personal, or to compound and settle any debts or other claims due or belonging to the estate, the receiver or trustee, or the bankrupt or debtor, or any creditor who has proved his claim, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing or directing such an act on the part of the receiver or trustee: Provided, That the court may, upon cause shown, order an immediate redemption of property without notice.

No. 29. Payment of moneys deposited.

No moneys deposited as required by the Act shall be drawn from the depository unless by check or draft, signed by the clerk of the court or by a receiver or trustee, and countersigned by the judge, or by a referee, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn. An entry of the substance of each check or draft, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the receiver or trustee; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any clerk authorized to countersign said checks.

No. 30. Imprisoned debtor.

If, at the time of the commencement of the proceedings under this Act, the bankrupt or debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the court, for the purpose of testifying in any manner relating to said proceedings; and, if committed after the commencement of said proceedings upon process in any civil action founded upon a claim provable under the Act, the judge may, upon like application, discharge him from such imprisonment. If the bankrupt or debtor, during the pendency of said proceedings, be arrested or imprisoned upon process in any civil action, the judge, upon his application, may issue a writ of habeas corpus to bring him before the judge to ascertain whether such process has been issued for the collection of any claim provable under the Act, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge, the judge shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

No. 31. Petition for discharge.

The petition of a bankrupt corporation for a discharge shall state concisely, in accordance with the provisions of the Act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

No. 32. Opposition to discharge.

Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition.

No. 33. Arbitration and compromise.

Whenever a receiver, trustee or debtor in possession shall make application to the court for authority to submit to arbitration any controversy arising in the settlement of an estate, or for authority to compromise any such controversy, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why it is proper and for the best interest of the estate that the controversy should be settled by arbitration or compromise.

No. 34. Costs in contested proceedings.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a civil action cognizable as a case in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

No. 35. Compensation of clerks, referees, receivers and trustees.

(1) The fees allowed by the Act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the Act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

(2) The compensation of referees, prescribed by the Act, shall be in full compensation for all services performed by them under the Act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the Act and allowed by special order of the judge.

(3) The compensation allowed to receivers or trustees by the Act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

(4) In any case in which the fees of the clerk, referee, and trustee are not required by the Act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees, receivers and trustees to be paid immediately after such commissions accrue and are earned.

No. 36. Appeals.

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States.

No. 37. General provisions.

In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or

with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding.

No. 38. Forms.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

No. 39. Representation of creditors by receivers or their attorneys.

Neither a receiver nor his attorney shall solicit any proof of claim, power of attorney, or other authority to act for or represent any creditor for any purpose in connection with the administration of an estate or the acceptance or rejection of any arrangement or plan.

No. 40. Receivers and marshals as custodians.

A receiver or marshal appointed by the court to take charge of the property of a bankrupt after the filing of a petition, shall be deemed to be a mere custodian within the meaning of section 48 of the Act [11:76], unless his duties and compensation are specifically enlarged by order of the court, upon proper cause shown, either at the time of the appointment or later.

No. 41. Waiver of right to share in deposits or in payments under an arrangement or plan.

Before confirming an arrangement or plan the court shall require all creditors and other persons who may have waived their right to share in the distribution of the deposit or in payments under the arrangement or plan, for claims, fees or otherwise, to set forth in writing and under oath all agreements with respect thereto with the debtor, his attorney or other person, and shall also require an affidavit by the debtor that he has not directly or indirectly paid or promised any consideration to any attorney, trustee, receiver, creditor, or other person in connection with the proceedings except as set forth in such affidavit or in the arrangement or plan, and that he has no knowledge of any such payment or promise by any other party.

No. 42. Compensation of attorneys.

No allowance of compensation shall be made to any attorney for a receiver, trustee or debtor in possession except for professional services.

No. 43. Fees and expenses of attorneys for petitioning creditors.

The court may deny the allowance of any fee to the attorney for petitioning creditors or the reimbursement of his expenses, or both, if it shall appear that the proceedings were instituted in collusion with the bankrupt or were not instituted in good faith.

No. 44. Appointment of attorneys.

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such

receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act [11:205], from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77 [11:205], when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

No. 45. Auctioneers, accountants and appraisers.

No auctioneer or accountant shall be employed by a receiver, trustee or debtor in possession except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof. The compensation of appraisers shall be provided for in like manner in the order appointing them.

No. 46. Banking institution as custodian, receiver or trustee. (Abrogated.)

No. 47. Reports of referees and special masters.

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

No. 48. Proceedings under chapter XI of the Act [11:701 to 799].

(1) This general order shall apply to proceedings under chapter XI of the Act [11:701 to 799].

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter XI or of this general order, apply to proceedings under chapter XI: Provided, That General Orders 18, 28 and 29 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 321 or 322 of the Act [11:721, 722].

(4) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

No. 49. Proceedings under section 77 of the Act [11:205].

(1) This general order shall apply to proceedings under section 77 of the Act [11:205].

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of section 77 [11:205] or of this general order, apply to proceedings under section 77: Provided, That General Orders 17, 18, 21, 28, 29 and 41 shall not apply to such proceedings.

(3) Each circuit court of appeals shall cause written notice to be given to the judges of the district courts within the circuit of the names and addresses of the persons from time to time designated and qualified to act as special masters under the provisions of subsection (c) of section 77.

(4) The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Interstate Commerce Commission copies of (a) the answer, if any, of the railroad corporation, or the pleading of any creditor controverting facts alleged in the petition; (b) the order approving or dismissing the petition; (c) any order (1) directing the debtor to give notice and fixing the date of a hearing on the appointment of a trustee or trustees, (2) appointing or removing a trustee, or (3) confirming the appointment of legal counsel

for the trustee or trustees, or removing such counsel; (d) any application by a trustee for authority to issue certificates, and any order authorizing such issuance; (e) such schedules and reports as may be submitted by the officers of the corporation or trustees with respect to the conduct of the debtor's affairs and the fairness of any proposed plan, and all orders issued to the trustee or trustees with respect to the operation of the corporation's business, together with the petitions upon which the orders were based; (f) the lists of bondholders, creditors, and stockholders required to be filed under paragraph (4) of subsection (c) of section 77, and any other information concerning the security holders filed pursuant to the order of the court; (g) any order determining the time within which, and the manner in which, claims may be filed or evidenced and allowed, and the division of creditors and stockholders into classes, and any order respecting the exercise of any power by any person or committee representing any creditor or stockholder; (h) any order allowing or rejecting such claims, or extending the time within which they may be filed or evidenced; (i) any order directing the trustee or trustees to report facts pertaining to irregularities, fraud, misconduct, or mismanagement, and any report made pursuant to such order; (j) any order directing the debtor or the trustee or trustees to keep records and accounts, in addition to those prescribed by the commission, for the segregation and allocation of earnings and expenses; (k) any order approving the special employment of assistants requested by the commission; (l) any application for allowances of compensation and expenses under the provisions of paragraphs (2) and (12) of subsection (c) of section 77, upon receipt of which the commission shall determine the maximum limits of such allowances and file with the court its report and order thereon, and any order making allowances for compensation and expenses under said paragraph; (m) any order issued upon the petition of the commission for the reference of particular matters to a special master, and the report of such master thereon; (n) any order allowing interested parties to intervene in the proceedings, any minute of appearance by a person other than interveners, and any rule defining matters upon which notice shall be given to other than interveners; (o) any order extending the time for filing a plan; (p) any motion to dismiss the proceedings because of undue delay in a reasonably expeditious reorganization of the debtor, and notice of any hearing with reference to dismissing the proceedings for such cause; (q) any notice of the time within which parties in interest may file with the court objections to the plan approved by the commission, and any objection to such plan and any claim for equitable treatment filed by a party in interest; (r) any order affirming a finding of the commission affecting the requirement that the plan be submitted to creditors or stockholders as provided in the second paragraph of subsection (e) of section 77; (s) any order entered on the disapproval of the plan, and the judge's opinion stating his conclusions and reasons for such disapproval; (t) if the plan is not confirmed, the order, with the judge's opinion stating his conclusions and reasons therefor, dismissing the proceedings or referring the case back to the commission for further proceedings, and, if the case is referred back to the commission, a copy of the evidence received in any hearings with reference to confirmation; (u) the order confirming the plan, with the judge's opinion stating his conclusions and reasons therefor, and any order directing the transfer or other disposition of the property; (v) the final decree; and (w) such other papers filed in the proceedings as the commission may request of the clerk or the court may direct him to transmit.

(5) The Interstate Commerce Commission shall forthwith cause to be filed in the district court having jurisdiction of the proceedings copies of (a) any order ratifying the appointment of a trustee or trustees; (b) each report and order authorizing the issue of trustees' certificates; (c) each order or call for a hearing, with a statement of its purposes; (d) each plan of reorganization, other than the debtor's, filed with the commission; (e) any report finding a plan to be prima facie impracticable; (f) any order refusing to approve a plan, together with the commission's report stating fully the reasons for its conclusions; (g) any petition for further hearing on a plan, and any supplemental order modifying any plan, together with the report stating the reasons for such modifications; (h) the written acceptances of any plan which is finally approved; (i) any order granting authority

for the issuance of securities or for other steps contemplated by the plan; (j) any order issued to the trustee or trustees with respect to the operation of the corporation's business; (k) any order issued under the provisions of subsection (p) of section 77 authorizing the solicitation, use, employment or action under or pursuant to proxies, authorizations, or deposit agreements; and (l) such other papers filed in the proceedings as the court may direct or the commission deem pertinent.

(6) The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Secretary of the Treasury copies of (a) any petition filed under subsection (a) of section 77; (b) the answer, if any, of the railroad corporation; (c) the order approving or dismissing the petition; (d) any order appointing or removing a trustee; (e) any application by a trustee for authority to issue certificates, and any order authorizing or refusing to authorize such issuance; (f) any order determining the time within which, and the manner in which, claims may be filed or evidenced and allowed, and the division of creditors and stockholders into classes; (g) any plan of reorganization filed with the court; (h) any order approving a plan, or referring the proceedings back to the commission for further action; (i) the order confirming a plan; (j) any application for allowances of compensation and expenses, and any order making or refusing to make such allowances; (k) the order dismissing the proceedings; (l) the final decree; (m) any opinion of the court, or report of a special master, with respect to the matters above enumerated; and (n) such other papers filed in the proceedings as the Secretary of the Treasury may request or the court may direct to be transmitted to him: Provided, That if the Secretary of the Treasury shall determine that the transmission of any such papers is unnecessary, he shall so notify the clerk, whereupon the clerk may dispense with the transmittal of further papers.

The clerk shall also transmit to the Collector of Internal Revenue for the district in which the proceedings are pending a copy of any petition filed under subsection (a) of section 77.

(7) The Interstate Commerce Commission shall forthwith cause to be transmitted to the Secretary of the Treasury copies of (a) any order ratifying the appointment of a trustee; (b) any plan of reorganization, other than the debtor's, filed with the commission; (c) any petition for alteration or modification of a plan; (d) any supplemental report and order modifying a plan, and (e) the plan certified by the commission to the court, together with the report and order approving the plan: Provided, That if the Secretary of the Treasury shall determine that the transmission of any such papers is unnecessary, he shall so notify the commission, whereupon the commission may dispense with the transmittal of further papers.

(8) All papers filed with the court and with the Interstate Commerce Commission shall have attached thereto such copies as may be required to carry out this general order.

(9) Any order fixing the time for a hearing on the approval or confirmation by the court of a plan which affects claims or stock of the United States shall include a reasonable notice to the Secretary of the Treasury of not less than thirty days.

(10) All proceedings before the commission under section 77 shall be conducted in accordance with its rules of practice and such special instructions, rules, and regulations as it may issue pursuant to the provisions of said section.

(11) All process to be served outside of the district in which proceedings under section 77 are pending shall be returnable at such time as the judge shall determine, and shall be directed to and served by the United States marshal for the district in which service is to be effected.

No. 50. Proceedings under section 75 of the Act [11:203].

The following rules shall apply to proceedings under section 75 of the Act [11:203]:

(1) Upon the expiration of the term of office of a conciliation commissioner, the judge may reappoint him or appoint other or additional conciliation commissioners.

(2) Every petition for relief filed under subdivision (c) of section 75 shall specify the county or counties in which any land used in the petitioner's farming

operations is situated, and shall not be granted unless a conciliation commissioner for such county, or for one of such counties, has previously been appointed. The clerk shall not accept the petition unless it is accompanied by the filing fee and the schedules, which shall be in duplicate. Upon the filing of the petition the judge shall enter an order either approving it as properly filed under the section, or dismissing it for want of jurisdiction. If the petition is approved, the case shall be referred, and one of the duplicate schedules delivered, to a conciliation commissioner appointed for service in said county or in one of said counties.

(3) Within ten days after the approval of the petition, or within such further time as the judge for cause shown may allow, the farmer shall file with the conciliation commissioner an inventory of his estate, and the commissioner shall thereupon call the first meeting of creditors, to be held before him at such place as he deems most convenient for the parties in interest, upon written and published notice as provided in section 58 of the Act [11:94]. Prior to the meeting he shall set off to the farmer the exemptions to which the farmer is entitled.

(4) If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the date of the first meeting, the conciliation commissioner shall, unless the judge for cause shown shall have permitted a further extension, forthwith report the facts to the judge, who shall thereupon dismiss the proceedings.

(5) The money to be paid upon the confirmation of a composition shall be placed in a depository to be designated by order of the judge, subject to withdrawal by the depositor upon the countersignature of the conciliation commissioner. The judge shall furnish a copy of this general order to the depositories and also the name of any conciliation commissioner whose countersignature is authorized.

(6) Application for confirmation shall be filed with the conciliation commissioner who shall forthwith transmit it to the judge with (a) the acceptances, (b) the proofs of claims which have been allowed and those which have been disallowed, (c) a list of the debts having priority, (d) a list of the secured debts, with a description of the security of each, (e) the final inventory, with a list of the exemptions, and (f) a report of the commissioner recommending or opposing confirmation and, in the case of an extension, stating to what extent, if any, it would be desirable for the court after confirmation to retain jurisdiction of the farmer and his property.

(7) The judge shall fix a date and place for a hearing before him upon the application for confirmation. At the hearing any creditor opposing confirmation shall file a written specification of the grounds of his opposition. If the judge does not confirm the proposal he may dismiss the proceedings, or refer the specifications to the commissioner for testimony and report and thereafter confirm the proposal or dismiss the proceedings.

(8) If a composition or extension proposal is set aside for fraud under the provisions of subdivision (m) of section 75 the case may be dismissed and the clerk shall notify the creditors accordingly. Whenever the terms of the proposal are modified under the provisions of subdivision (l) of said section, the clerk shall send a written notice of the modifications to the creditors.

(9) The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition, (c) a detailed inventory of so much of the property constituting the estate as under the laws of the State of which the decedent died a resident would be available for creditors, and (d) a list of the names and addresses of the creditors, showing the amounts allowed or apparently owing to each, the nature of the securities or liens, if any, held by each, and the claims which are entitled to priority. The petition shall show to the satisfaction of the district court that the decedent at the time of his death was a farmer within the meaning of subdivision (r) of section 75, and shall specify the county or counties in which at the time of the decedent's death his farming

operations occurred. If the petition is approved by the district court as properly filed under section 75, the clerk shall file a certified copy of the order of approval with the probate court, and from the date of such order until the case is dismissed the district court shall exercise exclusive jurisdiction over the property required to be listed in the inventory as above provided.

(10) Upon the approval of a personal representative's petition the case shall be referred to a conciliation commissioner and proceeded with as in all other cases under section 75 and this general order, except that (a) the original and any amended or supplementary inventory filed by the petitioner with the approval of the probate court shall be deemed to be correct, and no inventory shall be made by the commissioner; (b) all claims allowed by the probate court, and only such claims, shall be allowed by the commissioner or the district court; (c) the petitioner shall file with the application for confirmation a completed list of the claims allowed up to the date of the application, certified as correct by the probate court; and (d) the clerk shall file with the probate court certified copies of all orders of the judge confirming or denying the proposal, modifying its terms, or dismissing the proceedings before or after confirmation.

(11) In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. A supervisory conciliation commissioner, if appointed, shall exercise such supervision and control over the conduct of proceedings by conciliation commissioners as the judge may from time to time direct.

(12) The twenty-five dollar fees of the conciliation commissioner, and the fees and expenses of the supervisory conciliation commissioner, shall be payable out of appropriated funds in accordance with such instructions as may be issued from time to time by the Attorney General.

No. 51. Ancillary receiverships limited.

No ancillary receiver shall be appointed in any district court of the United States in any bankruptcy proceeding pending in any other district of the United States except (1) upon the application of the primary receiver, or (2) upon the application of any party in interest with the consent of the primary receiver, or by leave of a judge of the court of original jurisdiction. No application for the appointment of such ancillary receiver shall be granted unless the petition contains a detailed statement of the facts showing the necessity for such appointment, which petition shall be verified by the party in interest, or the primary receiver, or by an agent of the party in interest or primary receiver specifically authorized in writing for that purpose and having knowledge of the facts. Such authorization shall be attached to the petition.

No. 52. Proceedings under chapter X of the Act [11:501 to 676].

(1) This general order shall apply to proceedings under chapter X of the Act [11:501 to 676].

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter X or of this general order, apply to proceedings under chapter X: Provided, That General Orders 12, 16, 17, 18, 20, 21, 28, 29 and 41 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 127 or 128 of the Act [11:527, 528].

(4) Whenever, under the provisions of chapter X, a copy of any paper is required to be transmitted to the Securities and Exchange Commission, two copies thereof shall be transmitted.

(5) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

No. 53. Bond of designated depository under section 61 [11:101].

(1) The bond required of a banking institution designated as a depository shall be given with an authorized fidelity or bonding company as surety, or with approved individual sureties who are residents of the judicial district in which the court of bankruptcy or the banking institution is located, and two of whom are neither officers nor directors of the institution designated as a depository: Provided, That the judge may, in accordance with the provisions of, and the authority conferred in section 1126 of the Revenue Act of 1926, as amended (U. S. C., Title 6, section 15 [6:15]), accept the deposit of the securities therein designated, in lieu of a surety or sureties upon such bond.

(2) The condition of bonds hereafter given shall be substantially to the effect that the banking institution, so designated, shall well and truly account for and pay over all moneys deposited with it as such depository, and shall pay out such moneys only as provided by the bankruptcy law and applicable general orders and court rules, and shall abide by all orders of the court in respect of such moneys, and shall otherwise faithfully perform all duties pertaining to it as such depository; provided, that no security in the form of a bond or otherwise shall be required in the case of such part of the deposits as are insured under section 12B of the Federal Reserve Act, as amended.

(3) As one means of bringing before the judge of the bankruptcy court information respecting possible occasions for requiring a depository to give a new bond with different sureties, it shall be the duty of each depository to file with the bankruptcy court during the month of January in each year a sworn statement in writing disclosing

(a) Whether any of the individual sureties on its bond has removed from the judicial district of which he was a resident, or has died; and

(b) Whether the financial worth of any of its individual sureties has become materially impaired.

(4) As one means of bringing before the judge of the bankruptcy court information respecting occasions for requiring a depository to give a new bond in an increased amount, it shall be the duty of any depository, when its total of bankruptcy deposits equals ninety-five per centum of the amount of its current depository bond, forthwith to file a written statement with the bankruptcy court, setting forth the total amount of such deposits and the amount of its current bond.

(5) No receiver, trustee or debtor in possession shall deposit with any one depository funds committed to his custody as such receiver, trustee or debtor in possession in excess of the amount of the bond of such depository then in force.

(6) It shall be the duty of the judge to require a depository to give a new bond whenever it appears that the prior bond is not sufficient in amount, in view of present and prospective deposits, or that a surety has died or has removed from the judicial district of which he was a resident, or whenever there is otherwise occasion to believe that the prior bond does not constitute adequate security.

(7) It shall be the duty of the judge to require each depository to give a new bond within five years after the giving of its last prior bond.

(8) A surety, or the personal representative of a deceased surety, on the bond of a depository may, by a petition setting forth the grounds therefor, request the judge to require the depository to give a new bond and thereby to relieve such surety, or his estate, from responsibility and liability as respects any future default of the depository, and, if upon a hearing had after reasonable notice to the depository, to other sureties on the bond, and to the trustees or other representatives of estates having deposits in such depository, it appears to the judge that the petition can be granted without injury to any party in interest, the judge shall require the depository to give a new bond.

(9) A new bond given under any subdivision of this general order shall, from the time of its approval by the judge, be regarded as taking the place of the preceding bond as respects any subsequent default of the depository; and, upon approving the new bond, the judge shall enter an order relieving the sureties on the prior bond, and the estate of any deceased surety, from responsibility and liability thereon as respects any default of the depository occurring thereafter.

(10) If any depository, when required to give a new bond, fails to comply with that requirement within the time fixed therefor by this general order or by the

judge, it shall be the duty of the judge to order such depository to pay over all moneys on deposit with it as such depository, and to revoke its designation as depository.

No. 54. Proceedings under chapter XII of the Act [11:801 to 926].

(1) This general order shall apply to proceedings under chapter XII of the Act [11:801 to 926].

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter XII [11:801 to 926] or of this general order, apply to proceedings under chapter XII: Provided, That General Orders 17, 18, 21, 28 and 29 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 421 or 422 of the Act [11:821, 822].

(4) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

No. 55. Proceedings under chapter XIII of the Act [11:1001 to 1086].

(1) This general order shall apply to proceedings under chapter XIII of the Act [11:1001 to 1086].

(2) The general orders in bankruptcy shall, in so far as they are not inconsistent with the provisions of chapter XIII or of this general order, apply to proceedings under chapter XIII: Provided, That General Orders 14, 18 and 28 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) The clerk shall forthwith transmit to the Collector of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 621 or 622 of the Act [11:1021, 1022].

(4) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

(5) Each proof of claim shall, unless the court is satisfied from its other allegations that the claim is not based upon money loaned or upon any bond, note or other obligation, contain proof that the claim is free from usury as defined by the laws of the place where the debt was contracted.

No. 56. Rules by courts of bankruptcy.

Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States.

FORMS IN BANKRUPTCY

(N. B.—Oaths required by the Act, except upon hearing before a judge, may be administered by referees, by officers authorized to administer oaths in proceedings before the courts of the United States or under the laws of the State where the same are to be taken, and by diplomatic or consular officers of the United States in any foreign country.

Each paper filed should have a caption, similar to that of the Debtor's Petition, Form No. 1 [805], as prescribed in General Order 5.)

805. Debtor's Petition.

In the District Court of the United States for the — District of —.

In the matter of _____, Bankrupt.	}	In Bankruptcy No. —.
---	---	-------------------------

PETITION

To the Honorable — — —,

Judge of the District Court of the United States for the — District of —:

The petition of — — —, residing at No. — — — Street, in —, County of —, State of —, by occupation a —, and employed by — [or engaged in the business of —], respectfully represents:

1. Your petitioner has had his principal place of business [or has resided, or has had his domicile] at —, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

 Petitioner.

_____, Attorney.

STATE OF —, }
 COUNTY OF —. } ss:

I, — — —, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

 Petitioner.

Subscribed and sworn to before me this — day of —, 19—.

 [Official character.]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

Schedule A-1.

Statement of All Creditors to Whom Priority is Secured by the Act.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	When and where incurred or contracted.	Whether claim is contingent, unliquidated or disputed.	Nature and consideration of the debt, and whether incurred or contracted as partner or joint contractor and, if so, with whom.	Amount due or claimed.
a.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each, earned within three months before filing the petition.							\$
b.—Taxes due and owing to— (1) The United States. (2) The State of _____. (3) The county, district or municipality of _____, State of _____.							
c.—(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority. (2) Rent owing to a landlord who is entitled to priority by the laws of the State of _____, accrued within three months before filing the petition, for actual use and occupancy.							
Total.....							

_____, Petitioner.

Schedule A-2.

Creditors Holding Securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if un- known, that fact must be stated).	Description of securities.	When and where debts were contracted, and na- ture and consideration thereof.	Whether claim is contingent, unliqui- dated or disputed.	Value of securities		Amount due or claimed.
						\$		\$
					Total.....			

Petitioner.

Schedule A-3.

Creditors Whose Claims are Unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	When and where contracted.	Whether claim is contingent, unliquidated or disputed.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount due or claimed.
						\$
					Total.....	

_____, Petitioner.

Schedule A-4.

Liabilities on Notes or Bills Discounted Which Ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residences (if unknown, that fact must be stated).	Place where contracted.	Whether claim is disputed.	Nature and consideration of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount due or claimed.
						\$
					Total.....	

_____, Petitioner.

Schedule A-5.

Accommodation Paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residences of persons accommodated.	Place where contracted.	Whether claim is disputed.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount due or claimed.	
							\$	
						Total.....		

_____, Petitioner.

Oath to Schedule A.

State of _____ }
County of _____ } ss.

I, _____, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this _____ day of _____, 19—.

_____, Petitioner.

_____,
[Official character.]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

Schedule B-1.

Real Estate.

Location and description of all real estate owned by debtor, or held by him, whether under deed, lease or contract.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value of debtor's interest.	
			\$	
		Total.....		

_____, Petitioner.

Schedule B-2.
Personal Property.

<p>a.—Cash on hand.....</p> <p>b.—Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately).....</p> <p>c.—Stock in trade, in _____ business of _____, at _____, of the value of.....</p> <p>d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person.....</p> <p>e.—Books, prints, and pictures.....</p> <p>f.—Horses, cows, sheep, and other animals (with number of each).....</p> <p>g.—Automobiles and other vehicles.....</p> <p>h.—Farming stock and implements of husbandry.....</p> <p>i.—Shipping, and shares in vessels.....</p> <p>j.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated.....</p> <p>k.—Patents, copyrights, and trade-marks.....</p> <p>l.—Goods or personal property of any other description, with the place where each is situated.....</p>	\$	
Total.....		

_____, Petitioner.

Schedule B-3.
Choses in Action.

<p>a.—Debts due petitioner on open account.....</p> <p>b.—Policies of insurance.....</p> <p>c.—Unliquidated claims of every nature, with their estimated value.....</p> <p>d.—Deposits of money in banking institutions and elsewhere.....</p>	\$	
Total.....		

_____, Petitioner.

Schedule B-6.

Books, Papers, Deeds and Writings Relating to Debtor's Business and Estate.

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

_____, Petitioner.

Oath to Schedule B.

State of _____ } ss.
County of _____ }

I, _____, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Petitioner.

[Official character.]

SUMMARY OF DEBTS AND ASSETS.

[From the Statements of the Debtor in Schedules A and B.]

Schedule A.....	1-a	Wages.....		
Schedule A.....	1-b(1)	Taxes due United States.....		
Schedule A.....	1-b(2)	Taxes due States.....		
Schedule A.....	1-b(3)	Taxes due counties, districts and municipalities.....		
Schedule A.....	1-c(1)	Debts due any person, including the United States, having priority by laws of the United States.....		
Schedule A.....	1-c(2)	Rent having priority.....		
Schedule A.....	2	Secured claims.....		
Schedule A.....	3	Unsecured claims.....		
Schedule A.....	4	Notes and bills which ought to be paid by other parties thereto..		
Schedule A.....	5	Accommodation paper.....		
Schedule A, total				
Schedule B.....	1	Real estate.....		
Schedule B.....	2-a	Cash on hand.....		
Schedule B.....	2-b	Negotiable and non-negotiable instruments and securities.....		
Schedule B.....	2-c	Stock in trade.....		
Schedule B.....	2-d	Household goods.....		
Schedule B.....	2-e	Books, prints, and pictures.....		
Schedule B.....	2-f	Horses, cows, and other animals.....		
Schedule B.....	2-g	Automobiles and other vehicles.....		
Schedule B.....	2-h	Farming stock and implements.....		
Schedule B.....	2-i	Shipping and shares in vessels.....		
Schedule B.....	2-j	Machinery, fixtures, and tools.....		
Schedule B.....	2-k	Patents, copyrights, and trade-marks.....		
Schedule B.....	2-l	Other personal property.....		
Schedule B.....	3-a	Debts due on open accounts.....		
Schedule B.....	3-b	Policies of insurance.....		
Schedule B.....	3-c	Unliquidated claims.....		
Schedule B.....	3-d	Deposits of money in banks and elsewhere.....		
Schedule B.....	4	Property in reversion, remainder, expectancy or trust.....		
Schedule B.....	5	Property claimed as exempt.....		
Schedule B.....	6	Books, deeds and papers.....		
Schedule B, total				

Source of Form.

Official Form No. 1, 305 U. S. 717 (3 F. C. A. [Replacement Volume], pp. 320-327).

Cross-References.

Agricultural compositions and extensions, Forms 882-888.

Arrangements by wage earner, Forms 877-881.

Arrangements for reorganization or composition with creditors, Forms 867-871.

Corporate reorganizations, Forms 889-895.

Involuntary petition, Form 809.

Partnership petition, Form 808.

Real property arrangements for reorganization, except corporations, Forms 872-876.

Statutory References.

For notes concerning effect of Rules, Forms and Orders prescribed by Supreme Court, see notes to decisions to 3 F. C. A., Title 11, § 53.

Definition of words and phrases in bankruptcy practice, 3 F. C. A., Title 11, § 1; U. S. C. A., Title 11, § 1; id. U. S. C.

Duty of bankrupt to make and file schedules, 3 F. C. A., Title 11, § 25; U. S. C. A., Title 11, § 25; id. U. S. C.

Jurisdiction of courts, 3 F. C. A., Title 11, § 11; U. S. C. A., Title 11, § 11; id. U. S. C.

Power of Supreme Court to prescribe rules, forms, and orders, 3 F. C. A., Title 11, § 53; U. S. C. A., Title 11, § 53; id. U. S. C.

Prepayment of fees and expenses, 3 F. C. A., Title 11, § 79; U. S. C. A., Title 11, § 79; id. U. S. C.

Statutes concerning arrangements by wage earners for composition of creditors inapplicable to ordinary bankruptcy pro-

ceedings (Forms 1-63), 3 F. C. A., Title 11, § 1001; U. S. C. A., Title 11, § 1001; id. U. S. C.

Statutes concerning arrangements for reorganization or composition of creditor inapplicable to ordinary bankruptcy proceeding (Forms 1-63), 3 F. C. A., Title 11, § 701; U. S. C. A., Title 11, § 701; id. U. S. C.

Statutes concerning corporate reorganizations do not apply in ordinary bankruptcy proceedings, 3 F. C. A., Title 11, § 501; U. S. C. A., Title 11, § 501; id. U. S. C.

Statutes concerning real property arrangements for reorganization do not apply in ordinary bankruptcy proceedings (Forms 1-63), 3 F. C. A., Title 11, § 801; U. S. C. A., Title 11, § 801; id. U. S. C.

Who may become bankrupts, 3 F. C. A., Title 11, §§ 22, 23; U. S. C. A., Title 11, §§ 22, 23; id. U. S. C.

Who may file or dismiss petitions, 3 F. C. A., Title 11, § 95; U. S. C. A., Title 11, § 95; id. U. S. C.

General Orders in Bankruptcy.

General orders in bankruptcy, see 3 F. C. A. [Replacement Volume], Title 11, pps. 288-319; U. S. C. A. [Supp.], Title 11, pps. 5-41.

Amendment of petitions, Order No. 11.
Docket of cases, nature and form, Order No. 1.

Form of petition and other papers, captions, Order No. 5.

Indemnity for expenses and fees, Order No. 10.

Rules of Civil Procedure for District Courts apply insofar as not inconsistent with the Bankruptcy Act or the General Orders, Order No. 37.

Use of official forms required, Order No. 38.

NOTES TO DECISIONS**Claim of Exemption.**

Exemptions must be claimed seasonably and in accordance with the rules and practice in bankruptcy. In re Friedrich (C. C. A. 7), 100 Fed. 284, 3 Am. B. 801; In re Duffy (D. C.-Pa.), 118 Fed. 926, 9 Am. B. 358; In re Le Vay (D. C.-Pa.), 125 Fed. 990, 11 Am. B. 114; In re Kane (C. C. A. 7), 127 Fed. 552, 11 Am. B. 533; In re Stein (D. C.-Pa.), 130 Fed. 629, 12 Am. B. 384. Affd. Lipman v. Stein (C. C. A. 3), 134 Fed. 235, 14 Am. B. 80; Burke v. Guarantee Title & Trust Co. (C. C. A.

3), 134 Fed. 562, 14 Am. B. 31; In re Jennings & Co. (D. C.-Ga.), 166 Fed. 639, 22 Am. B. 160.

Bankrupt can not amend schedules so as to include further exemptions. In re Moran (D. C.-Va.), 105 Fed. 901, 5 Am. B. 472.

Bankrupt must claim the specific exempt articles. In re Wilson (D. C.-Va.), 108 Fed. 197, 6 Am. B. 287; In re Oliver (D. C.-Mo.), 109 Fed. 784, 6 Am. B. 626; In re Staunton (D. C.-Pa.), 117 Fed. 507, 9 Am. B. 79; In re Prince (D. C.-Pa.), 131

Fed. 546, 12 Am. B. 675, see *Burke v. Guarantee Title & Trust Co.* (C. C. A. 3), 134 Fed. 562, 14 Am. B. 31.

Bankrupt must comply with state law and schedule specific articles claimed as exemptions. In re *Wunder* (D. C.-Pa.), 133 Fed. 821, 13 Am. B. 701.

Schedule may be amended so as to include homestead exemption. In re *Fisher* (D. C.-Va.), 142 Fed. 205, 15 Am. B. 652; In re *Maxson* (D. C.-Iowa), 170 Fed. 356, 22 Am. B. 424.

Claim for exemption need not point out particular state law under which claim is made. In re *Duning* (D. C.-Pa.), 296 Fed. 243, 1 Am. B. (N. S.) 553.

Where in involuntary proceedings the property was sold as perishable before adjudication without notice to bankrupt, claim of exemption first made in schedule is in time. In re *Duning* (D. C.-Pa.), 296 Fed. 243, 1 Am. B. (N. S.) 553.

Claim of exemption of all produce was sufficiently specific though it did not claim any specific part. In re *Elston* (D. C.-Minn.), 17 Fed. (2d) 495, 9 Am. B. (N. S.) 291.

Bankrupt by failing to claim homestead exemption in his schedules waives the exemption. In re *Brooks* (D. C.-Tex.), 27 Fed. (2d) 146, 12 Am. B. (N. S.) 167.

The homestead right is not lost, however, where the failure to claim the homestead in the schedules was the result of error. In re *Brooks* (D. C.-Tex.), 27 Fed. (2d) 146, 12 Am. B. (N. S.) 167.

The Bankruptcy Act contains no requirement that bankrupt itemize property he claims as exempt, and the suggestion to that effect in the caption of the official form of schedule is merely directory. In re *Lippow* (C. C. A. 7), 92 Fed. (2d) 619, 35 Am. B. (N. S.) 187.

Involuntary bankrupt must file in court in triplicate within ten days from adjudication a schedule of property and specify therein what property is claimed as exempt. Failure to do so is a waiver of right of exemption. In re *Nunn* (D. C.-Ga.), 2 Am. B. 664.

Where claim of exemption is listed as "\$500.00 in lieu of a homestead," it is insufficient. In re *Groves* (D. C.-Ohio), 6 Am. B. 728.

Official Forms.

Court may refuse to file a petition which is not made on prescribed form. *Mahoney v. Ward* (D. C.-N. Car.), 100 Fed. 278, 3 Am. B. 770.

The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departure by falling into a habit of using the more costly, prolix, and far less suitable forms of special pleadings and procedure used in chancery cases. *W. A. Gage & Co. v. Bell* (D. C.-Tenn.), 124 Fed. 371, 10 Am. B. 696.

Bankrupt's failure to precisely observe form in claiming exemptions was not fatal to his claim in view of Order 38. *Burke v. Guarantee Title & Trust Co.* (C. C. A. 3), 134 Fed. 562, 14 Am. B. 31.

Strict adherence to form is not necessary in order to obtain an exemption in a court of bankruptcy. In re *Lenters* (D. C.-Pa.), 225 Fed. 878, 35 Am. B. 3.

"With such alteration as may be necessary" construed. In re *Passow* (C. C. A. 7), 300 Fed. 544, 4 Am. B. (N. S.) 1067.

The forms prescribed must be followed substantially. They have the force and effect of law. *Ragsdale v. Bothman*, 81 Mont. 408, 263 Pac. 972, 11 Am. B. (N. S.) 715.

Partnerships.

If the bankrupt desires a discharge from firm as well as individual debts, a proper foundation should be laid in his petition in order that notice will be given to firm creditors. In re *Laughlin* (D. C.-Iowa), 96 Fed. 589, 3 Am. B. 1.

Where a partnership files its petition in involuntary bankruptcy, a separate petition for each partner is unnecessary. In re *Gay* (D. C.-N. H.), 98 Fed. 870, 3 Am. B. 529.

Residence.

An allegation in a petition that bankrupts were and had been, for more than six months next preceding the date of the filing of the petition, engaging principally in the business of stockbrokers, and that their principal place of business during all such period had been and was in the borough of Manhattan, City of New York, and southern district of New York, sufficiently alleged the residence of the individuals and gave the court jurisdiction of them and of the firm which they composed, without reference to the length of time the firm had existed. In re *Mitchell* (C. C. A. 2), 219 Fed. 690, 33 Am. B. 463.

A voluntary petition alleging that petitioner had his principal place of business

(or has resided or has had his domicile) for the greater portion of six months next immediately preceding the filing of the petition in a specified district, conferred jurisdiction, notwithstanding the alternative character of the averments. *Jelliffe v. Thaw* (C. C. A. 2), 67 Fed. (2d) 880, 24 Am. B. (N. S.) 322.

Schedules, Form and Sufficiency.

It is the duty of the bankrupt to make an intelligent and true statement of affairs in preparing schedules. In re *Walther* (D. C.-N. Y.), 95 Fed. 941, 2 Am. B. 702.

Prescribed printed forms must be used. *Mahoney v. Ward* (D. C.-N. Car.), 100 Fed. 278, 3 Am. B. 770. Contra, In re *Soper* (D. C.-N. Y.), 1 Am. B. 193.

Petitions should be made out on printed forms. *Mahoney v. Ward* (D. C.-N. Car.), 100 Fed. 278, 3 Am. B. 770.

Schedules are in the nature of pleadings. *Johnson v. United States* (C. C. A. 1), 163 Fed. 30, 18 L. R. A. (N. S.) 1194, 20 Am. B. 724.

A voluntary petition is virtually a bill in equity praying a distribution of assets and a discharge of the bankrupt. In re *Von Borries* (D. C.-Wis.), 168 Fed. 718, 21 Am. B. 849.

The use of ditto marks is prohibited. In re *Orne* (D. C.-N. Y.), Fed. Cas. No. 10582, 1 Ben. 420; *Haack v. Theise*, 51 Misc. 3, 99 N. Y. S. 905, 16 Am. B. 699.

Schedules, List of Creditors.

Debts are not released by the discharge where creditors had no actual knowledge and their residence was not given in the schedule. *Miller v. Guasti*, 226 U. S. 170, 57 L. ed. 173, 33 Sup. Ct. 49, 29 Am. B. 201, affg. 203 N. Y. 259, 96 N. E. 416, 26 Am. B. 797.

A schedule listing a creditor as C. Ferger, Indianapolis, was sufficient. *Kreitlein v. Ferger*, 238 U. S. 21, 59 L. ed. 1184, 35 Sup. Ct. 685, 34 Am. B. 862.

Although claim against bankrupt for a debt has been reduced to a judgment and assigned, the bankrupt must schedule it. *Sellers v. Bell* (C. C. A. 5), 94 Fed. 801, 2 Am. B. 529.

Wife of bankrupt may prove debt due her, though, without her knowledge, the bankrupt failed to list such debt in his schedules. In re *Smith* (D. C.-N. Y.), 291 Fed. 587, 1 Am. B. (N. S.) 416.

Schedules giving names of creditors, but not stating amount of their claims, do

not comply with the statute, but bankrupt can not take advantage of that defect. In re *Watman* (D. C.-N. Y.), 291 Fed. 886, 1 Am. B. (N. S.) 331.

That bankrupt thought that a creditor would not press him does not excuse failure to schedule debt. In re *Applebaum* (C. C. A. 2), 11 Fed. (2d) 685, 7 Am. B. (N. S.) 732.

Extreme exactness is necessary in scheduling creditors both as to names and addresses. *Marshall v. English-American Loan & Trust Co.*, 127 Ga. 376, 56 S. E. 449; *Armstrong v. Sweeney*, 73 Nebr. 775, 103 N. W. 436; *Horbach v. Arkell*, 172 App. Div. 566, 158 N. Y. S. 842; *Liesum v. Kraus*, 35 Misc. 376, 71 N. Y. S. 1022. But see *Gatliff v. Mackey*, 31 Ky. L. 947, 104 S. W. 379.

Where bankrupt's schedule contained correct name of original debtor and the nature and amount of the original debt, such claim was properly scheduled. *Ross-Lewin v. Goold*, 211 Ill. 384, 71 N. E. 1028; *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2; *Loomis v. Walblom*, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, 3 Ann. Cas. 798, 13 Am. B. 687; *Longfield v. Minnesota Sav. Bank*, 95 Minn. 54, 103 N. W. 706, 14 Am. B. 413.

Naming of street on which creditor lived without giving number is insufficient when bankrupt knew the number or would have known it had he used due diligence. *Bartlett v. Taylor*, 209 Mo. App. 612, 238 S. W. 141, 48 Am. B. 180.

Listing creditor's address as New York City was sufficient where creditor's stationery carried only that address. *Clafin v. Wolff*, 88 N. J. L. 308, 96 Atl. 73. 38 Am. B. 852.

All debts must be duly scheduled in time for proof and allowance with names of the creditors, if known to the bankrupt. *Columbia Bank v. Birkett*, 174 N. Y. 112, 66 N. E. 652, 102 Am. St. 478, 9 Am. B. 481; *Custard v. Wigderson*, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740, 17 Am. B. 337.

Schedule should contain list of creditors and addresses. In re *Quackenbush*, 122 App. Div. 456, 106 N. Y. S. 773, 19 Am. B. 647; *Murphy v. Blumenreich*, 123 App. Div. 645, 108 N. Y. S. 175, 19 Am. B. 910; *Westheimer v. Howard*, 47 Misc. 145, 93 N. Y. S. 518, 14 Am. B. 547; *Haack v. Theise*, 51 Misc. 3, 99 N. Y. S. 905, 16 Am. B. 699.

"Merchants Bank of Brooklyn" was sufficient listing of bank creditor of bank-

rupt in his schedules. *Merchants Bank v. Miller*, 176 App. Div. 412, 162 N. Y. S. 999, 39 Am. B. 416. *Affd.* 221 N. Y. 490, 116 N. E. 1060.

Address of creditor, given as "135 Bway," is insufficient. *Sutherland v. Lasher*, 41 Misc. 249, 84 N. Y. S. 56, 11 Am. B. 780.

Address of judgment creditor may be listed under address of his attorney of record. *In re David*, 44 Misc. 516, 90 N. Y. S. 85; *Feldmark v. Weinstein*, 45 Misc. 329, 90 N. Y. S. 478.

Claim of judgment creditor whose address was listed as "unknown" was not properly scheduled. *Schiller v. Weinstein*, 47 Misc. 622, 94 N. Y. S. 763, 15 Am. B. 183. *Contra*, *In re Mollner*, 75 App. Div. 441, 78 N. Y. S. 281.

Residence address and not office address of customer is necessary. *Weidenfeld v. Tillinghast*, 54 Misc. 90, 104 N. Y. S. 712. *Affd.* 104 N. Y. S. 902, 18 Am. B. 531.

Claim of partnership was properly scheduled in firm name although it had been dissolved by death of one partner. *Lutz v. Kalmus* (App. Div.), 115 N. Y. S. 230.

In individual bankruptcy proceedings, schedule showing claim against partnership owing to "various concerns" was not sufficiently scheduled. *City Nat. Bank v. Greene* (Tex. Civ. App.), 279 S. W. 893, 7 Am. B. (N. S.) 912.

Where a creditor named "Custard" was listed as "Castard," his claim was not properly scheduled. *Custard v. Wigderon*, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740, 17 Am. B. 337.

The Christian name as well as the surname of each creditor should be listed. *In re Mackey* (D. C.-N. Y.), 1 Am. B. 593.

Schedules, Property and Its Value.

Corporate stock pledged by bankrupt to secure a loan should be listed in his schedules. *In re Hirsch* (D. C.-Tenn.), 96 Fed. 468, 2 Am. B. 715.

Bankrupt must schedule interest in both realty and personality whether vested, contingent, in remainder, or in expectancy. *In re Bandouine* (D. C.-N. Y.), 96 Fed. 536, 3 Am. B. 55; *In re Shenberger* (D. C.-Ohio), 102 Fed. 978, 4 Am. B. 487; *Woods v. Little* (C. C. A. 3), 134 Fed. 229, 13 Am. B. 742; *Pollack v. Meyers Bros. Drug Co.* (C. C. A. 8), 233 Fed. 861; *In re Hess* (D. C.-N. Y.), 5 Fed. Supp. 232, 24 Am. B. (N. S.) 359. *Contra*, *In re Seal* (D. C.-N. Y.), 261 Fed. 112,

44 Am. B. 556; *In re Meiburg* (D. C.-Iowa), 1 Fed. Supp. 892, 22 Am. B. (N. S.) 279.

Bankrupt should schedule government pension. *In re Bean* (D. C.-Vt.), 100 Fed. 262, 4 Am. B. 53.

Life insurance policies carried by bankrupt on his own life and payable to himself should have been listed. *In re Becker* (D. C.-N. Y.), 106 Fed. 54, 5 Am. B. 438.

Bankrupt must list equitable interest in land. *In re Gailey* (C. C. A. 7), 127 Fed. 538, 11 Am. B. 539.

Bankrupt could not omit property on advice of his attorney that it was exempt. *In re Breitling* (C. C. A. 7), 133 Fed. 146, 13 Am. B. 126; *Sinclair v. Butt* (C. C. A. 8), 284 Fed. 568, 49 Am. B. 488.

If when the schedules are filed, the property is still in specie, the articles themselves should be described, and he will not be permitted to claim subsequently his exemptions out of the proceeds of the property sold. *In re Exum* (D. C.-Ala.), 209 Fed. 716, 31 Am. B. 691.

Alleged trust fund which was really borrowed money should have been scheduled by bankrupt. *Miller v. United States* (C. C. A. 4), 277 Fed. 721, 48 Am. B. 31.

The act does not require a bankrupt corporation to list its corporation name as a part of its assets, nor does the same pass to creditors, subject to the payment of debts, nor does the adjudication terminate bankrupt's corporate existence. *Theobald-Jensen Elec. Co. v. Harry I. Wood Elec. Co.* (C. C. A. 6), 285 Fed. 29, 49 Am. B. 510.

Complete inventory of bankrupt's estate may not be required. *R. J. Reynolds Tobacco Co. v. A. B. Jones & Co.* (C. C. A. 8), 54 Fed. (2d) 329, 19 Am. B. (N. S.) 202.

Moribund obligations are not required to be included in the schedules; only those debts that are enforceable need be listed. *In re Scher* (D. C.-N. Y.), 21 Fed. Supp. 441.

A cause of action to recover property transferred in fraud of creditors is not property of a bankrupt, and the bankrupt's failure to schedule such cause of action was not cause for denial of discharge. *In re Eric* (D. C.-N. Y.), 25 Fed. Supp. 211, 39 Am. B. (N. S.) 466.

Bankrupt's failure to list his interest in automobile purchased by him for his wife was not cause for denial of discharge in bankruptcy, the bankrupt not owning any interest therein. *In re Eric* (D. C.-

N. Y.), 25 Fed. Supp. 211, 39 Am. B. (N. S.) 466.

Exempt property as well as other property must be scheduled. *Friedsam v. Rose* (Tex. Civ. App.), 271 S. W. 417, 6 Am. B. (N. S.) 864.

Schedules, Verifications.

Defective verification may be remedied by amendment. *In re Brumelkamp* (D. C.-N. Y.), 95 Fed. 814, 2 Am. B. 318.

An attorney can not make oath to a bankrupt's schedules without special authorization by law. *In re Blankfein* (D. C.-N. Y.), 97 Fed. 191, 3 Am. B. 165.

Certificate of notary appearing upon petition and schedule in bankruptcy, that petitioner subscribing them made solemn oath that the statements contained in the petition were true, and that after being by said notary first duly sworn, did declare schedules attached thereto to be in accordance with acts of Congress relating to bankruptcy was sufficient verification. *In re McConnell* (D. C.-N. Y.), 11 Am. B. 418.

Verification of Pleadings.

Since the verification of a petition in bankruptcy is a formal matter and does not reach to the jurisdiction of the matter, it may be waived by pleading to the merits. *Leidigh Carriage Co. v. Stengel* (C. C. A. 6), 95 Fed. 637, 2 Am. B. 383.

Where petition and schedules of bankrupt are verified before a notary public, the verification must show that it was made within the jurisdiction of the notary. *In re Brumelkamp* (D. C.-N. Y.), 95 Fed. 814, 2 Am. B. 318.

Verification should be by petitioners when facts are within their knowledge. Equity Rule 29. *In re Nelson* (D. C.-Wis.), 98 Fed. 76, 1 Am. B. 63; *In re Connecticut Brass & Mfg. Corp.* (D. C.-Conn.), 257 Fed. 445, 43 Am. B. 376.

That notary public who took verification of bankrupt to voluntary petition was attorney for bankrupt did not invalidate adjudication where he did not become attorney for bankrupt until later in the proceedings. *In re Kindt* (D. C.-Iowa), 98 Fed. 403, 3 Am. B. 443.

Where a petition bore a notary's certificate, but, in fact, was not sworn to, there was no verification and consequently there was nothing to amend. *In re Frank* (D. C.-Pa.), 234 Fed. 665, 37 Am. B. 19. Affd. 239 Fed. 709.

Leave granted by Appellate Court to amend petition verified only on information and belief. *Massagli v. T. I. Butler Co.* (C. C. A. 9), 39 Fed. (2d) 346, 16 Am. B. (N. S.) 10. Cert. den. 282 U. S. 840, 75 L. ed. 746, 51 Sup. Ct. 21, 16 Am. B. (N. S.) 525.

Execution of power of attorney after verification of petition by agent was not a fatal defect. *Kay v. Federal Rubber Co.* (C. C. A. 3), 46 Fed. (2d) 64, 17 Am. B. (N. S.) 459.

The absence of a notarial stamp on the affidavit supporting the petition was not a fatal defect. *Lubell v. M. J. L. Shoe Shops* (C. C. A. 3), 56 Fed. (2d) 158, 20 Am. B. (N. S.) 351.

Verification upon belief is insufficient. *In re Lippincott & Co.* (D. C.-Del.), 3 Fed. Supp. 1019, 23 Am. B. (N. S.) 423.

806. Statement of Affairs For Bankrupt or Debtor Not Engaged in Business.

(Note.—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.)

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, or section 622 of chapter XIII.)

1. Name and residence.

- a. What is your full name?
- b. Where do you now reside?
- c. Where else have you resided during the six years immediately preceding the filing of the original petition herein?

2. Occupation and income.

- a. What is your occupation?
- b. Where are you now employed?
(Give the name and address of your employer, or the address at which you carry on your trade or profession, and the length of time you have been so employed.)
- c. Have you been in partnership with anyone, or engaged in any business, during the six years immediately preceding the filing of the original petition herein?
(If so, give particulars, including names, dates and places.)
- d. What amount of income have you received from your trade or profession during each of the two years immediately preceding the filing of the original petition herein?
- e. What amount of income have you received from other sources during each of these two years?
(Give particulars, including each source, and the amount received therefrom.)

3. Income tax returns.

- a. Where did you file your last federal and state income tax returns, and for what years?

4. Bank accounts and safe deposit boxes.

- a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?
(Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)
- b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?
(Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and, if surrendered, when surrendered, or, if transferred, when transferred and the name and address of the transferee.)

5. Books and records.

- a. Have you kept books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein?

- b. In whose possession are these books or records?
(Give names and addresses.)
- c. Have you destroyed any books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein?
(If so, give particulars, including date of destruction and reason therefor.)

6. Property held in trust.

- a. What property do you hold in trust for any other person?
(Give name and address of each person, and a description of the property and the amount or value thereof.)

7. Prior bankruptcy or other proceedings; assignments for benefit of creditors.

- a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein?
(Give the location of the bankruptcy court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)
- b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee?
(If so, give the name and location of the court, the nature of the proceeding, a brief description of the property, and the name of the receiver or trustee.)
- c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein?
(If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

8. Suits, executions and attachments.

- a. Have you been party plaintiff or defendant in any suit within the year immediately preceding the filing of the original petition herein?
(If so, give the name and location of the court, the title and nature of the proceeding, and the result.)
- b. Has any execution or attachment been levied against your property within the four months immediately preceding the filing of the original petition herein?
(If so, give particulars, including property seized and at whose suit.)

9. Loans repaid.

- a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein?

(Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship.)

10. Transfer of property.

- a. What property have you transferred or otherwise disposed of during the year immediately preceding the filing of the original petition herein?

(Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

11. Losses.

- a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the original petition herein?

(If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)

_____,
Bankrupt [or Debtor].

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

_____,
Bankrupt [or Debtor].

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 2, 305 U. S. 730 (3 F. C. A. [Replacement Volume], pp. 327, 328).

Statutory Reference.

Duty of bankrupt to make and file statement of affairs, 3 F. C. A., Title 11, 25; U. S. C. A., Title 11, § 25; id. U. S. C.

Cross-Reference.

In connection with Forms 806 to 891, see general provisions concerning forms, notes to Form 805.

807. Statement of Affairs For Bankrupt or Debtor Engaged in Business.

(Note.—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.)

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, or section 622 of chapter XIII.)

1. Nature, location and name of business.**a. What business are you engaged in?**

(If business operations have been terminated, give the date of such termination.)

b. Where, and under what name, do you carry on such business?**c. When did you commence such business?****d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein?**

(Give street addresses, the names of any partners, joint adventurers, or other associates, the nature of the business, and the periods for which it was carried on.)

2. Books and records.**a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein?**

(Give names, addresses, and periods of time.)

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein?

(Give names, addresses, and dates of audits.)

c. In whose possession are your books of account and records?

(Give names and addresses.)

3. Financial statements.**a. Have you issued any financial statements within the two years immediately preceding the filing of the original petition herein?**

(Give dates, and the names and addresses of the persons to whom issued, including mercantile and trade agencies.)

4. Inventories.

- a. When was the last inventory of your property taken?
- b. By whom, or under whose supervision, was this inventory taken?
- c. What was the amount, in dollars, of the inventory?
(State whether the inventory was taken at cost, market, or otherwise.)
- d. When was the next prior inventory of your property taken?
- e. By whom, or under whose supervision, was this inventory taken?
- f. What was the amount, in dollars, of the inventory?
(State whether the inventory was taken at cost, market, or otherwise.)
- g. In whose possession are the records of the two inventories above referred to?
(Give names and addresses.)

5. Income other than from operation of business.

- a. What amount of income, other than from the operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein?
(Give particulars, including each source, and the amount received therefrom.)

6. Income tax returns.

- a. Where did you file your last federal and state income tax returns, and for what years?

7. Bank accounts and safe deposit boxes.

- a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?
(Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)
- b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?
(Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and, if surrendered, when surrendered, or, if transferred, when transferred and the name and address of the transferee.)

8. Property held in trust.

- a. What property do you hold in trust for any other person?
(Give name and address of each person, and a description of the property and the amount or value thereof.)

9. Prior bankruptcy or other proceedings; assignments for benefit of creditors.

- a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein?
(Give the location of the bankruptcy court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)
- b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee?
(If so, give the name and location of the court, the nature of the proceeding, a brief description of the property, and the name of the receiver or trustee.)
- c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein?
(If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

10. Loans repaid.

- a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein?
(Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the bankrupt or debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and, if so, the relationship. If the bankrupt or debtor is a corporation, state whether the lender is or was an officer, director or stockholder, or a relative of an officer, director or stockholder, and, if so, the relationship.)

11. Transfer of property.

- a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein?
(Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

12. Accounts receivable.

- a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein?
(If so, give names and addresses of assignees.)

13. Losses.

- a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein?
(If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)
(If the bankrupt or debtor is a partnership or corporation the following additional questions should be answered.)

14. Withdrawals.

- a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original petition herein?
(Give the name of each person, whether a partner, officer, director or manager, the dates and amounts of withdrawals, and the nature or purpose thereof.)

15. Members of partnership; officers, directors, managers, and principal stockholders of corporation.

- a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent. or more of the issued and outstanding stock, of the corporation?

Bankrupt [or Debtor].

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

Bankrupt [or Debtor].

Subscribed and sworn to before me this _____ day of _____, 19—.

[Official character.]

Source of Form.

Official Form No. 3, 305 U. S. 734 (3
F. C. A. [Replacement Volume], pp. 328,
329).

Cross-Reference.

See notes to Form 806.

808. Partnership Petition.

To the Honorable ———, Judge of the District Court of the United States
for the ——— District of ———:

The petition of ———, of ———, and ———, of ———, respectfully
represents:

1. Your petitioners are copartners, trading under the firm name of ———, and file this petition jointly in behalf of said partnership and of themselves, individually.
2. The said partnership and your petitioners have had their principal place of business at ———, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.
3. The said partnership and your petitioners owe debts.
4. Your petitioners are willing to surrender all of the property of said partnership and all of their individual property for the benefit of the creditors of said partnership and of their creditors, except such property as is exempt by law, and desire to obtain the benefit of the Act of Congress relating to bankruptcy.
5. The schedule hereto annexed, marked Schedule A, and verified by the oaths of your petitioners, contains a full and true statement of all the debts of said partnership, and, so far as it is possible to ascertain, the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said Act.
6. The schedule hereto annexed, marked Schedule B, and verified by the oaths of your petitioners, contains an accurate inventory of all the property, real and personal, of said partnership, and such further statements concerning said property as are required by the provisions of said Act.
7. The schedule hereto annexed, marked Schedule C, and verified by the oath of your petitioner, ———, contains a full and true statement of all his individual debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.
8. The schedule hereto annexed, marked Schedule D, and verified by the oath of your petitioner, ———, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.
9. The schedule hereto annexed, marked Schedule E, and verified by the oath of your petitioner, ———, contains a full and true statement of all his individual debts, and, so far as it is possible to ascertain, the names

and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

10. The schedule hereto annexed, marked Schedule F, and verified by the oath of your petitioner, — — —, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioners pray that the said partnership, and each of your petitioners, may be adjudged by the court to be a bankrupt within the purview of said Act.

Petitioners.

_____, Attorney.

STATE OF _____, }
COUNTY OF _____. } ss:

_____ and _____, the petitioners named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

Petitioners.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

Source of Form.

Official Form No. 4, 305 U. S. 739 (3 F. C. A. [Replacement Volume], p. 330).

Note.

Annex schedules corresponding to schedules under Form 805 and Statement

of Affairs under Forms 806 or 807, whichever is proper.

Cross-References.

Involuntary petition, Form 809.
Petition by individual, Form 805.

NOTES TO DECISIONS

In General.

Where individual petitioners were adjudged bankrupt on petition of all of the partners praying that "the petitioners" be adjudged bankrupt, but the allegations of the petition and the schedules showed partnership assets and liabilities and that

petitioners were partners, the petition and discharge were amended nunc pro tunc when application for discharge was heard. In re Meyers (D. C.-N. Y.), 97 Fed. 757, 1 Am. B. 504. See also In re Morrison (D. C.-Tex.), 127 Fed. 186, 11 Am. B. 498.

809. Creditors' Petition.

To the Honorable — —, Judge of the District Court of the United States for the — District of —:

The petition of — —, of —, and — —, of —, and — —, of —, respectfully represents:

1. — —, of —, has had his principal place of business [or has resided or has had his domicile] at —, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Said — — owes debts to the amount of \$1000, and is not a wage-earner or a farmer.

3. Your petitioners are creditors of said — —, having provable claims against him, fixed as to liability and liquidated in amount, amounting in the aggregate, in excess of the value of securities held by them, to \$500. The nature and amount of your petitioners' claims are as follows:

4. Within four months next preceding the filing of this petition, the said — — committed an act of bankruptcy, in that he did heretofore, to wit, on the — day of —, 19—,

Wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon said —, as provided in the Act of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said Act.

Petitioners.

_____, Attorney.

STATE OF —, }
COUNTY OF —. } ss:

— —, — —, and — —, the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Petitioners.

Subscribed and sworn to before me this — day of —, 19—.

[Official character.]

Source of Form.

Official Form No. 5, 305 U. S. 741 (3 F. C. A. [Replacement Volume], p. 330).

Cross-References.

Partnership petition, Form 808.
Petition by individual, Form 805.

Statutory References.

Acts of bankruptcy, 3 F. C. A., Title 11, § 21; U. S. C. A., Title 11, § 21; id. U. S. C.

Acts of bankruptcy, preference of creditors, 3 F. C. A., Title 11, § 96; U. S. C. A., Title 11, § 96; id. U. S. C.

General Orders in Bankruptcy.

List of creditors in involuntary bankruptcies, Order No. 9.

NOTES TO DECISIONS**In General.**

Use of prescribed forms in involuntary proceedings against partnership. *Mather v. Coe* (D. C.-N. Y.), 92 Fed. 333, 1 Am. B. 504.

Involuntary petition praying for adjudication, seizure of property by marshal, injunction, and receiver, was multifarious. *In re Ogles* (D. C.-Tenn.), 93 Fed. 426, 1 Am. B. 671.

Averment in involuntary petition that bankrupt at a certain time received money from a specified source, which "he has ever since concealed and secreted with intent to hinder, delay or defraud his creditors," was not defective for want of particularity, the details of the concealment being matter of evidence. *In re Bellah* (D. C.-Del.), 116 Fed. 69, 8 Am. B. 310.

Petition alleging several acts of bankruptcy was not objectionable. Allegations held to sufficiently state the commission of an act of bankruptcy within four months of the filing of the petition. *Bradley Timber Co. v. White* (C. C. A. 5), 121 Fed. 779, 10 Am. B. 329.

An involuntary petition relying on a fraudulent conveyance as an act of bankruptcy should be made as specific as possible, but petitioners are not required to set forth details not within their knowledge, and the intent can be averred in general terms. *In re Mero* (D. C.-Conn.), 128 Fed. 630, 12 Am. B. 171.

Involuntary petition omitting averment that the alleged bankrupt owes debts to the amount of \$1,000 or over did not confer jurisdiction. *C. C. Taft Co. v. Century Sav. Bank* (C. C. A. 8), 141 Fed. 369, 15 Am. B. 594.

A bankrupt can not be compelled to furnish list of creditors. *In re Levi* (C. C. A. 2), 142 Fed. 962, 15 Am. B. 294. *Cert. den.* 203 U. S. 596, 51 L. ed. 333, 27 Sup. Ct. 784.

Petition alleging transfer of property to trustee for creditors sufficiently averred act of bankruptcy. *E. L. Welch Co. v. Blakstad* (C. C. A. 8), 290 Fed. 194, 4 Am. B. (N. S.) 103.

The general rules of pleading and practice apply, and an involuntary petition which fails to state whether an alleged contract was oral or in writing, or who made the contract, is insufficient. *In re Lowry* (D. C.-Wash.), 294 Fed. 906.

Involuntary petition was insufficient, as failing to show that bankrupt's failure to discharge a judgment was an act of bankruptcy within 3 F. C. A., Title 11, § 21; U. S. C. A., Title 11, § 21; id. U. S. C. Mere averment in the language of the statute is insufficient. *In re Godwin* (D. C.-N. Car.), 296 Fed. 167, 4 Am. B. (N. S.) 871.

Allegations as to acts of bankruptcy, merely stating the language of the statute, are insufficient; the facts must be set forth. *In re Morosco Holding Co.* (D. C.-N. Y.), 296 Fed. 516, 2 Am. B. (N. S.) 332.

Averment of transfer of all of bankrupt's property to her brother for the purpose and with the intention of hindering, delaying, and defrauding creditors. *In re Smith* (D. C.-Ill.), 14 Fed. (2d) 464, 8 Am. B. (N. S.) 539.

Creditors in an involuntary petition need not aver that they were creditors at the time of alleged preferences, or that the creditors preferred were not secured creditors. *In re Weintraub* (D. C.-Pa.), 30 Fed. (2d) 548, 13 Am. B. (N. S.) 480. *Affd.* (C. C. A. 3), 30 Fed. (2d) 550, 13 Am. B. (N. S.) 485.

Averments of act of bankruptcy must set forth all the elements enumerated in 3 F. C. A., Title 11, § 21; U. S. C. A., Title 11, § 21; id. U. S. C. *In re Bayman* (D. C.-Pa.), 41 Fed. (2d) 86, 16 Am. B. (N. S.) 183.

Involuntary petition alleging acts of bankruptcy in language of statute is sufficient, but petitioners may be required to set out facts. *Kay v. Federal Rubber Co.* (C. C. A. 3), 46 Fed. (2d) 64, 17 Am. B. (N. S.) 459.

Appointment of receiver as an act of bankruptcy must be alleged in the petition. *In re Evans* (D. C.-Nev.), 52 Fed. (2d) 961, 19 Am. B. (N. S.) 57.

Involuntary petition alleging insolvency, though without supporting facts, prevailed over an exhibit showing appointment of receiver but not setting forth insolvency. *Canal Steel Works v. Worth Steel Co.* (C. C. A. 5), 54 Fed. (2d) 583, 19 Am. B. (N. S.) 143.

General allegation of insolvency in involuntary petition is sufficient. *In re Interstate Oil Corp.* (C. C. A. 9), 63 Fed. (2d) 674, 22 Am. B. (N. S.) 755.

Petition alleging that while insolvent a receiver had been put in charge of the property of the bankrupt and that bankrupt admitted its insolvency and consented to the appointment sufficiently described an act of bankruptcy within 3 F. C. A., Title 11, § 21 (a) (5); U. S. C. A., Title 11, § 21 (a) (5); *id.* U. S. C. Blue Valley Creamery Co. v. Stone (C. C. A. 3), 80 Fed. (2d) 483, 30 Am. B. (N. S.) 356.

Involuntary petitions failing to show that petitioners are bona fide owners of claims against bankrupt was insufficient. *In re Pickering Lbr. Co.* (D. C.-Mo.), 1 Fed. Supp. 82, 22 Am. B. (N. S.) 259.

General allegation that while insolvent, the alleged bankrupt had transferred money to various creditors whose names were unknown to petitioners was intent to create a preference was insufficient. *In re Zumberis* (D. C.-Pa.), 24 Fed. Supp. 368.

Validity of a petition in bankruptcy is not destroyed where an honest bankrupt is known by a nickname in his community and files under his true name, and jurisdiction to discharge attaches and remains, where, accompanying his petition, is a proper schedule of his creditors and obligations. *Kundert v. Riese*, 225 Wis. 276, 274 N. W. 286.

Corporations.

An involuntary petition against a corporation must allege that the corporation is not one of those excluded from the benefits of the Bankruptcy Act. *In re L.*

Humbert Co. (D. C.-Iowa), 100 Fed. 439, 4 Am. B. 76.

Involuntary petition by a corporation must be verified by some person authorized to sign and verify the petition, and such authorization must appear from the petition. *In re Bellah* (D. C.-Del.), 116 Fed. 69, 8 Am. B. 310.

Partnerships.

Petition against partnership alone must not only show its insolvency, but also that the partners are insolvent or that their net individual assets are insufficient to cover the deficiency in partnership assets. *In re Griffith* (D. C.-Del.), 280 Fed. 878, 48 Am. B. 622.

Involuntary petition against certain persons described as "copartners, trading as an alleged common-law trust," was insufficient. *In re Parker* (C. C. A. 7), 283 Fed. 404, *revg.* (D. C.-Ill.), 275 Fed. 868, 48 Am. B. 697.

Complaint against two individuals described as trading under a common name did not justify adjudication as a partnership. *In re Anderson Motor Co.* (D. C.-Tex.), 18 Fed. (2d) 1001, 10 Am. B. (N. S.) 61.

Petition by partner in commendam against the partnership, alleging its insolvency, and himself as a creditor, was an involuntary petition, and insufficient for failure to charge an act of bankruptcy. *Hunter v. Hunter* (D. C.-La.), 8 Fed. Supp. 84, 26 Am. B. (N. S.) 531.

Verification.

That involuntary petition is verified by but two of the three petitioning creditors is not a jurisdictional defect, but merely calls for a motion to require a proper verification. *Green River Deposit Bank v. Craig* (D. C.-Ky.), 110 Fed. 137, 6 Am. B. 381.

Verification of an involuntary petition is not jurisdictional and verification by the attorney for petitioners, such attorney having full knowledge of the facts, was sufficient. *In re Chequasset Lbr. Co.* (D. C.-N. Y.), 112 Fed. 56, 7 Am. B. 87.

An involuntary petition need not be verified by a formal affidavit, it being sufficient that it is verified in some recognized form. *In re Bellah* (D. C.-Del.), 116 Fed. 69, 8 Am. B. 310.

As it is not declared that the petition shall be verified by the creditor in person, the verification will be sufficient if made by the agent or attorney representing the

creditor, it being made to appear that the affiant has knowledge of the facts verified. In re Hunt (D. C.-Iowa), 118 Fed. 282, 9 Am. B. 251.

An involuntary petition may be verified by the attorney for the petitioning creditors if such attorney has knowledge of the facts essential to justify an adjudication, but a verification on information and belief which does not distinguish between facts based on knowledge and those based on information only is insufficient, but may be cured by amendment. In re Vastbinder (D. C.-Pa.), 126 Fed. 417, 11 Am. B. 118.

Verification of involuntary petition stating that petitioners were outside the district, and that their attorney had authority to make the verification, and that the statements in the petition were true to his own knowledge, was sufficient. Rogers v. De Soto Placer Min. Co. (C. C. A. 9), 136 Fed. 407, 14 Am. B. 252.

An involuntary petition filed by a partnership and a corporation was properly verified by the president of the corporation and a member of the partnership. Walker v. Woodside (C. C. A. 9), 164 Fed. 680, 21 Am. B. 132.

Verification of an involuntary petition on information and belief is insufficient, but the defect may be cured by amendment. In re Bieler (C. C. A. 2), 295 Fed. 78, 2 Am. B. (N. S.) 192.

Verification by petitioner corporation in involuntary proceedings was sufficient. In re Seifred (C. C. A. 1), 4 Fed. (2d) 305, 6 Am. B. (N. S.) 33, affg. (D. C.-Mass.), 293 Fed. 936, 2 Am. B. (N. S.) 91.

Verification by state auditor on behalf of state petitioning for adjudication to enforce an excise tax was sufficient. In re Kootenai Motor Co. (D. C.-Idaho), 41 Fed. (2d) 403, 15 Am. B. (N. S.) 731.

810. Subpoena to Alleged Bankrupt.

United States of America, — District of —.

To —, in said district:

A petition in bankruptcy having been filed on the — day of —, 19—, before the District Court of the United States within and for the — District of —, as a court of bankruptcy, praying that you may be adjudged a bankrupt under the Act of Congress relating to bankruptcy,

You are hereby summoned and required to appear and plead to said petition, on or before the — day of —, 19—; and, if you fail to do so, you may be adjudged a bankrupt by default.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, this — day of —, 19—.

Clerk.

[SEAL OF THE COURT]

Source of Form.

Official Form No. 6, 305 U. S. 742 (3 F. C. A. [Replacement Volume], p. 331).

General Orders in Bankruptcy.

Nature and form of process, Order No. 3.

Statutory Reference.

Service of process, 3 F. C. A., Title 11, § 41; U. S. C. A., Title 11, § 41; id. U. S. C.

NOTES TO DECISIONS

Process.

The return day must be fixed by the issuance of the subpoena. In re L. Hum-

bert Co. (D. C.-Iowa), 100 Fed. 439, 4 Am. B. 76.

Subpoenas issued under Order No. 3 are subject to limitations found in 8 F. C. A., Title 28, § 654; U. S. C. A., Title 28, § 654; id. U. S. C. In re Hemstreet (D. C.-Iowa), 117 Fed. 568, 8 Am. B. 760.

Bankruptcy courts may issue alias subpoenas when for any reason it has been impossible to serve the original. Gleason v. Smith, Perkins & Co. (C. C. A. 3), 145 Fed. 895, 16 Am. B. 602.

There is nothing in 3 F. C. A., Title 11, § 41; U. S. C. A., Title 11, § 41; id. U. S. C. which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. In re Western Inv. Co. (D. C.-Okla.), 170 Fed. 677, 21 Am. B. 367.

Service in accordance with 3 F. C. A., Title 11, § 41a; U. S. C. A., Title 11, § 41a; id. U. S. C. does not require that the writ of subpoena shall contain the special memorandum mentioned in Equity Rule 12. In re Wing Yick Co. (D. C.-Hawaii), 13 Am. B. 360.

Publication.

If personal service can not be had, upon filing an affidavit an order of publication will be made. In re Murray (D. C.-Iowa), 96 Fed. 600, 3 Am. B. 601.

Where the order of the judge did not designate any day upon which the defendant was required to appear and demur, answer, or plead, but merely directed that the bankrupt be cited by publication, and that the citation be published, and the order was not published, but instead of it a citation issued by the clerk containing a direction to appear at a time and place named to answer, the court had no jurisdiction. S. L. Bauman Diamond Co. v. Hart (C. C. A. 5), 192 Fed. 498, 27 Am. B. 632.

Typographical error in printing order for publication did not vitiate bankruptcy proceedings. Hunter, Walton & Co. v. Cherry Co. (C. C. A. 8), 247 Fed. 458, 40 Am. B. 732.

811. Answer of Alleged Bankrupt.

A petition having been filed in the above court on the — day of —, 19—, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, your respondent now appears and answers the said petition as follows:

1. Respondent admits the allegations contained in paragraphs — of the petition.
2. Respondent denies each and every allegation contained in paragraphs — of the petition.

Wherefore your respondent prays that a hearing may be had on said petition and this answer, and that the issues presented thereby may be determined by the court [or by a jury].

STATE OF —, }
COUNTY OF —. } ss:

I, —, the respondent named in the foregoing answer, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this — day of —, 19—.

[Official character.]

Source of Form.

Official Form No. 7, 305 U. S. 742 (3 F. C. A. [Replacement Volume], p. 331).

Statutory References.

Answer by farmer for composition and extension of time to pay debts, 3 F. C. A., Title 11, § 203 (c); U. S. C. A., Title 11, § 203 (c); id. U. S. C.

Answers in corporate reorganization proceedings, 3 F. C. A., Title 11, §§ 536, 537; U. S. C. A., Title 11, §§ 536, 537; id. U. S. C.

Pleadings by alleged bankrupt, 3 F. C. A., Title 11, § 41; U. S. C. A., Title 11, § 41; id. U. S. C.

NOTES TO DECISIONS**In General.**

Superfluous allegations of insolvency need not be traversed. *West Co. v. Lea*, 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. 836, 2 Am. B. 463.

Where answer denied that debtor committed such act of bankruptcy, the answer thereby denied insolvency at the time of the alleged preference. *Troy Wagon Works v. Vastbinder* (D. C.-Pa.), 130 Fed. 232, 12 Am. B. 352.

An answer to an involuntary petition can not be construed as a voluntary petition. In *re Condon* (C. C. A. 2), 209 Fed. 800, 31 Am. B. 754.

Filing mere written appearance without pleading is of no avail. In *re Puget Sound Engineering Co.* (D. C.-Wash.), 270 Fed. 353, 46 Am. B. 310.

Sufficiency of petition on its face to authorize adjudication, being a question of law, may be tested by motion to dismiss as under Equity Rule 29, but new matter raising an issue of fact must be set up by answer. *E. B. Badger Co. v. Arnold* (C. C. A. 1), 282 Fed. 115, 49 Am. B. 72.

Where bankrupt files answer setting up solvency, and demands jury trial, the court may compel him to annex to his answer a schedule of assets and liabilities. In *re Robt. T. Cochran & Co.* (D. C.-N. Y.), 44 Fed. (2d) 417, 16 Am. B. (N. S.) 369.

Motion of bankrupt to dismiss petition opens up the whole record and all papers filed are to be regarded by the court. In *re Willner* (D. C.-N. Y.), 4 Fed. Supp. 991, 24 Am. B. (N. S.) 149.

Where bankrupt withdrew motion to dismiss petition and filed answer, the motion could not thereafter be renewed where petition did not show jurisdictional defects on its face. In *re Willner* (D. C.-N. Y.), 4 Fed. Supp. 991, 24 Am. B. (N. S.) 149.

Amendments to an answer to creditors' involuntary petition, to defendant on

grounds of fraud and estoppel, must allege facts; were general or vague conclusions are insufficient. In *re National Motorship Corp.* (D. C.-N. Y.), 7 Fed. Supp. 1001, 26 Am. B. (N. S.) 603.

A bankrupt's defenses should be set up in his answer and not as grounds of motion to dismiss a petition good on its face. In *re Greenberg* (D. C.-N. Y.), 23 Fed. Supp. 836, 37 Am. B. (N. S.) 171.

Admissions.

An adjudication on a voluntary appearance and answer admitting the averments of the petition concludes the bankrupt who entered the appearance and filed the answer. In *re Western Inv. Co.* (D. C.-Okla.), 170 Fed. 677, 21 Am. B. 367.

An answer by the individual partners in which they admitted the allegations thereof did not render the petition a voluntary one. *Central State Bank v. Harrington* (C. C. A. 6), 4 Fed. (2d) 514, 6 Am. B. (N. S.) 46.

Bankrupt's answer to involuntary petition admitting the making of a mortgage but denying intent to defraud was insufficient where there was no denial of insolvency or an intent to prefer. In *re Southern Fruit & Produce Co.* (D. C.-Fla.), 14 Fed. (2d) 676, 8 Am. B. (N. S.) 385.

Allegation in involuntary petition not denied in the answer is admitted. *Sheehan v. North Eastern Shoe Co.* (C. C. A. 1), 47 Fed. (2d) 487, 17 Am. B. (N. S.) 654.

Demurrer or Reply.

The sufficiency of an answer to an involuntary petition can not be raised by demurrer. *Goldman v. Smith* (D. C.-Ky.), 93 Fed. 182, 1 Am. B. 266.

Where demurrer and answer are both directed to the whole petition and filed together, the demurrer is waived. In *re Cooper* (D. C.-Pa.), 159 Fed. 956, 20 Am. B. 392.

Demurrer to petition comes too late Middle West Utilities Co. (C. C. A. 7), 70
after an answer has been filed. In re Fed. (2d) 825.

812. Petition for Appointment of Receiver.

(Caption.)

To the honorable judges of the District Court of the United States for
the — District of —:

The petition of —, of —, respectfully represents:

1. He is one of the petitioning creditors herein.
2. An involuntary petition in bankruptcy was filed herein on the —
day of —, 19—.
3. The alleged bankrupt, —, was engaged in business as a — at —.
4. The said — has a large amount of merchandise at said place of
business consisting of —, reported to be of the value of — dollars
(\$—).
5. It is absolutely necessary for the preservation of said property that
a receiver be appointed, for the reason that [Here state reasons for appoint-
ment of receiver, such as that the business has been abandoned by the
alleged bankrupt, or that the property is being removed, or that the business
is being conducted or unnecessary expenses incurred so as to threaten loss
to the estate].

Wherefore, your petitioner prays that a receiver be appointed to take
charge of the business of the alleged bankrupt and to conduct the same
until a trustee can be elected, and for such other order in the premises as
may be just and lawful.

Petitioner.

Attorney.

STATE OF —, }
COUNTY OF —. } ss:

I, —, the petitioner named in the foregoing petition, hereby make
solemn oath that the statements contained therein are true according to
the best of my knowledge, information, and belief.

Petitioner.

Subscribed and sworn to before me this — day of —, 19—.

Official character.

Cross-Reference.

Receiver's bond, see Form 837.

Statutory References.

Application for seizure of property by receiver, 3 F. C. A., Title 11, § 109; U. S. C. A., Title 11, § 109; id. U. S. C.

Appointment of receiver, 3 F. C. A., Title 11, § 11 (3); U. S. C. A., Title 11, § 11 (3); id. U. S. C.

Appointment of receiver in proceedings for arrangements for reorganizations, 3 F. C. A., Title 11, § 732; U. S. C. A., Title 11, § 732; id. U. S. C.

Appointment of receivers in corporation reorganizations, 3 F. C. A., Title 11, §§ 515 to 517; U. S. C. A., Title 11, §§ 515 to 517; id. U. S. C.

Continuance of bankrupt's business by receiver, 3 F. C. A., Title 11, § 11 (5); U. S. C. A., Title 11, § 11 (5); id. U. S. C.

NOTES TO DECISIONS**In General.**

Petition for appointment of receiver must show the necessity for the appointment, and the consent of the bankrupt is not sufficient to justify the appointment of an unnecessary receiver. *T. S. Faulk & Co. v. Steiner* (C. C. A. 5), 165 Fed. 861, 21 Am. B. 623.

Facts showing necessity for appointment without notice should be shown by sworn petition, especially in view of provision as to marshals. In *re Press Printers & Publishers* (C. C. A. 3), 12 Fed. (2d) 660, 8 Am. B. (N. S.) 111, affg. (D. C.-N. J.), 4 Fed. (2d) 159, 5 Am. B. (N. S.) 442.

813. Bond of Applicant for a Receiver or Marshal.

Know all men by these presents: That we, ———, as principal, and ———, as surety, are held and firmly bound unto ———, in the sum of ——— dollars, to be paid to the said ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the ——— District of ——— against the said ———, and the said ——— has applied to that court to have a receiver [or marshal] take charge of the property of said ———, subject to the further order of said court;

Now, therefore, if said property be taken in charge by said receiver [or marshal], and if the said ——— shall indemnify the said ——— for such costs, counsel fees, expenses, and damages as may be occasioned by such seizure, taking, and detention of such property in the event the said petition is dismissed or withdrawn by the petitioners, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the
presence of

_____ [SEAL]

_____ [SEAL]

Approved this ——— day of ———, 19—.

District judge or referee in bankruptcy.

Source of Form.

Official Form No. 8, 305 U. S. 743 (3 F. C. A. [Replacement Volume], p. 331).

Statutory Reference.

Bond and application for seizure of property by receiver, 3 F. C. A., Title 11, § 107; U. S. C. A., Title 11, § 107; id. U. S. C.

814. Order Appointing Receiver.

(Caption.)

At —, in said district, on the — day of —, 19—.

Whereas, a petition was filed in this court on the — day of —, 19—, by —, a petitioning creditor, praying that a receiver be appointed of the assets of the alleged bankrupt herein;

It is ordered, that —, Esquire, of —, be and he hereby is appointed receiver of all assets and property, wherever located, belonging to the alleged bankrupt; and

It is ordered, that said receiver give a bond to the United States of America in the sum of — dollars (\$—), conditioned on the faithful performance of his duties as such receiver; and

It is further ordered, that said alleged bankrupt forthwith deliver to said receiver all of his property now in his possession or under his control and said alleged bankrupt and all other persons, firms, corporations, and all creditors of said alleged bankrupt as well as their attorneys, agents, and servants and all marshals, sheriffs, and other officers, deputies, and their employees are hereby restrained from removing or otherwise interfering with the property of the above-named alleged bankrupt and from prosecuting, executing, or suing out of any court any process, attachment, or other writ for the purpose of taking possession of or interfering with any of the property of the said alleged bankrupt and from interfering in any manner with the receiver hereby appointed in the discharge of his duties.

United States district judge.

Cross-Reference.

See notes to Form 812.

General Orders in Bankruptcy.

Receiver presumed to be mere custodian unless order of court specifically enlarges his duties, Order No. 40.

NOTES TO DECISIONS**In General.**

Bankruptcy receiver could be appointed to take charge of property of the bankrupt, and keep the same until the further order of court. *In re Fixen & Co.* (D. C.-Cal.), 96 Fed. 748, 8 Am. B. 822.

A special order is necessary to enlarge the duties of a receiver to conduct the business of the bankrupt. *In re Singer Furn. Corp.* (D. C.-N. Y.), 47 Fed. (2d)

780, 18 Am. B. (N. S.) 1. *Revd. on other grounds, Childs v. Empire Trust Co.* (C. C. A. 2), 54 Fed. (2d) 981. *Cert. den.* 286 U. S. 554, 76 L. ed. 1289, 52 Sup. Ct. 579.

A receiver in bankruptcy can administer the estate only in accordance with the orders of the court, his sole function being preservation of the estate. *Meehan v. King* (C. C. A. 1), 54 Fed. (2d) 761, 19 Am. B. (N. S.) 151.

Order appointing receiver "enlarged" his "duties" under General Order No. 40. *Childs v. Empire Trust Co.* (C. C. A. 2), 54 Fed. (2d) 981, 19 Am. B. (N. S.) 489. Cert. den. 286 U. S. 554, 76 L. ed. 1289, 52 Sup. Ct. 579; *In re Cameo Curtains* (D. C.-N. Y.), 4 Fed. Supp. 672, 23 Am. B. (N. S.) 336.

A receiver who is authorized to continue the business of the bankrupt has authority to withdraw money from a depository without special order. *Childs*

v. Empire Trust Co. (C. C. A. 2), 54 Fed. (2d) 981, 19 Am. B. (N. S.) 489. Cert. den. 286 U. S. 554, 76 L. ed. 1289, 52 Sup. Ct. 579.

To "carry on the business" is the same thing as to "continue" it, under 3 F. C. A., Title 11, § 11 (5); U. S. C. A., Title 11, § 11 (5); *id.* U. S. C., merely doing what is necessary to hold the assets as they are is not "continuing" the business. *Vass v. Conron Bros. Co.* (C. C. A. 2), 59 Fed. (2d) 969, 21 Am. B. (N. S.) 546.

815. Petition for Appointment of Ancillary Receiver.

(Caption.)

To the honorable judges of the United States District Court for the
— District of —:

The petitioner — respectfully represents:

1. That on the — day of —, 19—, an involuntary petition in bankruptcy was filed in the United States District Court for the — District of — against the above-named alleged bankrupt by three creditors of the alleged bankrupt, alleging acts of bankruptcy as follows:

2. That on the — day of —, 19—, petitioner was duly appointed and qualified as receiver of the estate of the said alleged bankrupt in the — District of —, and is still acting as said receiver.

3. That assets of the estate of the alleged bankrupt, consisting of — of the value of — dollars (\$—) are located at — and within the jurisdiction of this court.

4. Petitioner believes that it is absolutely necessary that an ancillary receiver be appointed by this court to take possession of the aforesaid assets located in this district in order to conserve said assets and to protect the interests of creditors therein.

Wherefore, petitioner prays for an order of this court appointing an ancillary receiver of all of the assets of the estate of the above-named alleged bankrupt located within the jurisdiction of this court, to take possession of and preserve the same until the appointment of a trustee herein; directing any and all persons in this district having property of the alleged bankrupt in their possession to deliver the same to the ancillary receiver appointed herein; and restraining and enjoining all persons from interfering in any manner with such receiver.

(Verification.)

Petitioner.

Statutory Reference.

Appointment of ancillary receiver, 3 F. C. A., Title 11, §§ 11 (20), 109; U. S. C. A., Title 11, §§ 11 (20), 109; *id.* U. S. C.

General Orders in Bankruptcy.

Limitations upon appointment of ancillary receivers, Order No. 51.

816. Order Appointing Ancillary Receiver.

(Caption.)

At — in said district on the — day of —, 19—.

Whereas a petition was filed in this court on the — day of —, 19—, by —, duly appointed, qualified, and acting receiver in bankruptcy of the estate of the above-named alleged bankrupt in the — District of —, and it appearing that certain assets of the said bankrupt estate, are located within the jurisdiction of this court, and that the appointment of an ancillary receiver herein is absolutely necessary for the preservation of said assets and in aid of the receiver appointed in the — District of —.

It is ordered, that —, Esquire, be and he is hereby appointed ancillary receiver herein; and

It is ordered, that said ancillary receiver give bond in the sum of — dollars (\$—) for the faithful discharge of his duties as such receiver; and

It is further ordered, that all persons having possession of any assets of the estate of the above-named alleged bankrupt in this district, deliver same forthwith to said ancillary receiver and all persons are hereby restrained and enjoined from interfering in any manner with the ancillary receiver appointed herein in the discharge of his duties.

United States district judge.

Cross-Reference.

See notes to Form 815.

817. Petition by Receiver for Leave to Appoint Attorney.

(Caption.)

To the District Court of the United States for the District of —:

The petition of — respectfully represents:

1. That on — —, 19—, he was duly appointed receiver in bankruptcy of the above-named alleged bankrupt and has duly qualified and is now acting as such receiver.

2. That petitioner desires to retain —, Esquire, of —, as attorney to represent him in the administration of the estate herein.

3. That petitioner has selected the said — to serve as counsel herein because of his wide experience in bankruptcy practice and general qualifications for such service.

4. That retention of an attorney is necessary for the purpose of conducting examinations of the alleged bankrupt relative to moneys alleged to have been paid to creditors by way of preferences, discovering assets, collecting outstanding accounts of the alleged bankrupt, bringing legal proceedings, advising the receiver, and for other matters incident to the administration of the estate.

5. That to the best of petitioner's knowledge, the said — has no connection with the alleged bankrupt, the creditors, or any other party in interest or with their respective attorneys.

Wherefore, petitioner prays for an order authorizing him to retain the said — as his attorney in this proceeding.

(Verification.)

Petitioner.

Note.

See General Order 44 for requirements as to appointment of attorneys.

Attorney for creditor not disqualified to act as attorney for receiver, 3 F. C. A., Title 11, § 72; U. S. C. A., Title 11, § 72; id. U. S. C.

Cross-Reference.

See notes to Form 819.

General Orders in Bankruptcy.

Appointment of attorneys, necessity, Order No. 44.

Statutory References.

Appointment and compensation of attorneys, 3 F. C. A., Title 11, § 76a; U. S. C. A., Title 11, § 76a; id. U. S. C.

NOTES TO DECISIONS

In General.

General Order No. 44 is to be strictly observed and an oral statement made to the judge can not operate as the substitute for the verified application required thereby. In re Stratton (C. C. A. 2), 51

Fed. (2d) 984, 18 Am. B. (N. S.) 523. Cert. den. 284 U. S. 682, 76 L. ed. 576, 52 Sup. Ct. 199; In re Rogers-Pyatt Shellac Co. (C. C. A. 2), 51 Fed. (2d) 988, 18 Am. B. (N. S.) 533, affg. 43 Fed. (2d) 863.

818. Order Authorizing Receiver to Retain Counsel.

(Caption.)

At — in said district on the — day of —, 19—.

Whereas a verified petition was filed in this court on the — day of —, 19—, by —, receiver herein, praying for an order authorizing him to retain — as attorney for the receiver and it appearing to the court that the said — represents no interest adverse to the alleged bankrupt, the creditors or any other party in interest and that his employment would be to the best interests of the estate, it is

Ordered, that —, receiver herein, be and he is hereby authorized to retain —, Esquire, of — as attorney for the receiver in this proceeding.

Date—.

United States district judge.

Cross-Reference.

See notes to Form 817.

819. Petition for Allowance by Attorney for Receiver.

(Caption.)

To the honorable —, Referee in Bankruptcy.

The petition of — respectfully represents:

1. That, pursuant to authority granted by order of this court dated — —, 19—, a certified copy of which is attached hereto, petitioner was

retained by —, the receiver herein, as attorney for the said receiver on — —, 19—.

2. Between said — day of —, 19—, and — day of —, 19—, the petitioner acted as attorney for the receiver herein and performed various legal services. Attached hereto and made a part hereof is a detailed statement setting forth with particularity the services rendered herein by your petitioner as such attorney.

3. Petitioner paid necessary expenses and disbursements on behalf of the estate herein in the total sum of — dollars (\$—), as shown by the annexed schedule of expenses, none of which has been repaid to petitioner.

4. In the opinion of the petitioner, a reasonable compensation for the above-mentioned services rendered by him herein is — dollars (\$—).

Wherefore, your petitioner respectfully prays that he be allowed the sum of — dollars (\$—), as compensation for services rendered by him as attorney for the receiver herein and the further sum of — dollars (\$—) in payment of disbursements made by him.

(Verification.)

Petitioner.

Cross-Reference.

See notes to Form 817.

Notice to creditors, 3 F. C. A., Title 11, § 94; U. S. C. A., Title 11, § 94; id. U. S. C.

Statutory References.

Compensation, 3 F. C. A., Title 11, §§ 76a, 102; U. S. C. A., Title 11, §§ 76a, 102; id. U. S. C.

General Orders in Bankruptcy.

Compensation of attorneys, Order No. 42.

NOTES TO DECISIONS

In General.

Petition for allowances not accompanied by an affidavit can not be considered. In re Deckler (D. C.-N. Y.), 36 Fed. (2d) 105, 15 Am. B. (N. S.) 261.

Attorneys acting for receiver without an order of appointment by the court are not entitled to compensation. In re Eureka Upholstering Co. (C. C. A. 2), 48 Fed. (2d) 95, 17 Am. B. (N. S.) 735; In re Stratton (C. C. A. 2), 51 Fed. (2d) 984, 18 Am. B. (N. S.) 523. Cert. den. 284 U. S. 682, 76 L. ed. 576, 52 Sup. Ct. 199; In re Rogers-Pyatt Shellac Co. (C. C. A. 2), 51 Fed. (2d) 988, 18 Am. B. (N. S.) 533, affg. 43 Fed. (2d) 863; In re National Accessories (D. C.-Nebr.), 13 Fed. Supp. 278.

Form of statement is suggested in In re National Accessories (D. C.-Nebr.), 13 Fed. Supp. 278.

Appointees of the court, whether receiver, trustee, or attorney, should be

meticulous in keeping accurate account of the items which go to make up their claim, and it will not do to state the services performed in a general way, and ask for a bulk allowance. In re National Accessories (D. C.-Nebr.), 13 Fed. Supp. 278.

The allowance to attorneys for receivers and trustees depends largely on the time employed, the difficulty of legal questions involved, the result achieved, the amount at stake and the size of the estate. In re National Accessories (D. C.-Nebr.), 13 Fed. Supp. 278.

Where the statement of services rendered by special counsel, the regularity of whose appointment is questioned, does not comply with the requirements as to detail and items, and the benefits of such service are not visible, claim for services will be denied. In re California Land Buyers Syndicate (D. C.-Cal.), 22 Fed. Supp. 183, 36 Am. B. (N. S.) 275.

820. Counterbond to Receiver or Marshal.

Know all men by these presents: That we, ———, as principal, and ———, as surety, are held and firmly bound unto ———, marshal of the United States of the ——— District of ——— [or the receiver appointed by the District Court of the United States for the ——— District of ——— to take charge of the property of ———], in the sum of ——— dollars, lawful money of the United States, to be paid to the said ———, his successors in office or assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Signed and sealed this ——— day of ———, 19——.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the said district court against the said ———, and the said court has ordered said ——— to take charge of the property of the said ———, subject to the further order of the court, and the said district court upon a petition of said ——— has ordered the said property to be released to him,

Now, therefore, if the said property shall be released accordingly to the said ———, and the said ———, being adjudged a bankrupt, shall account for and turn over said property or pay the value thereof in money at the time of seizure to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
the presence of

_____ [SEAL]
_____ [SEAL]

Approved this ——— day of ———, 19——.

District judge or referee in bankruptcy.

Source of Form.

Official Form No. 9, 305 U. S. 744 (3 F. C. A. [Replacement Volume], pp. 321, 322).

Statutory Reference

Counter bond to prevent seizure of property by receiver, 3 F. C. A., Title 11, § 109; U. S. C. A., Title 11, § 109; id. U. S. C.

821. Petition in Reclamation Proceedings.

(Caption.)

To the honorable judges of the District Court of the United States for the ——— District of ———:

The petition of AB respectfully represents:

1. That petitioner is a wholesale dealer in ——— and has his principal place of business at ———.
2. That before the commencement of this proceeding in bankruptcy the above-named bankrupt was engaged in the business of ——— at ———.

3. That on — —, 19—, petitioner delivered on consignment to the bankrupt herein, at the special instance and request of the said bankrupt, the following-described merchandise: — all of the value of — dollars (§ —).

4. That before delivery of said merchandise, to wit, on — —, 19—, petitioner and bankrupt entered into an agreement in writing, copy of which is hereto annexed, whereby said merchandise was to remain the sole and absolute property of petitioner subject to the conditions contained in said agreement.

5. That on — —, 19—, the above-named bankrupt was adjudged a bankrupt, and thereafter on — —, 19—, John Doe was duly appointed and qualified as receiver and is now acting as such receiver.

6. That on — —, 19—, the said John Doe, as such receiver took possession of the bankrupt's estate, including the above-described merchandise, and although duly demanded of him, the said John Doe, receiver herein, has failed and refused to return said merchandise to petitioner, who is the sole owner thereof.

Wherefore, petitioner prays for an order directing John Doe, receiver herein, to deliver to petitioner the above-described property.

AB.

Petitioner.

Date—.

(Verification.)

Statutory Reference.

Right to bankrupt's property, 3 F. C. A., Title 11, § 110; U. S. C. A., Title 11, § 110; id. U. S. C.

822. Order Granting Reclamation.

(Caption.)

At —, in said district, on the — day of —, 19—.

The petition of AB for reclamation of certain property now in the possession of the receiver herein, having come on for hearing, and after hearing —, Esquire, attorney for petitioner in support of the said petition, and —, Esquire, attorney for the receiver, in opposition thereto, on motion of —, Esquire, attorney for the said AB, it is

Ordered, that —, Receiver herein, be and he is hereby directed, within — days after date hereof, to surrender and deliver to the said AB the property described in said petition for reclamation, to wit —.

Date—.

United States district judge.

Statutory Reference.

Rights to bankrupt's property, 3 F. C. A., Title 11, § 110; U. S. C. A., Title 11, § 110; id. U. S. C.

823. Report of Receiver.

(Caption.)

To the honorable judges of the District Court of the United States for the — District of —.

I, —, do hereby render and file my final account and report as receiver of the estate of the above-named bankrupt.

1. On the — day of —, 19—, I was duly appointed and qualified as receiver herein and filed the bond required of me in the sum of — dollars (\$—).

2. On the — day of —, 19—, I visited the premises of the bankrupt at — where the bankrupt conducted the business of —. I took possession of said premises and all property located therein, together with all records, books of accounts, and papers found on said premises and placed — in charge thereof as custodian. I directed the said custodian to take an inventory of all of the property and caused all outstanding insurance policies to be sent to the issuing companies for a transfer of interest.

3. On the — day of —, 19—, and in pursuance of the authority granted by the order appointing me receiver herein, I engaged the services of the necessary employees and continued the business previously conducted by the bankrupt for a period of — days. On — —, 19—, an order was made by this court on my application authorizing the sale of the remaining assets of the estate at public auction. By said order —, —, and — were appointed as appraisers.

4. Thereafter on the — day of —, 19—, the assets of the estate were sold at public auction for the gross sum of — dollars (\$—), and thereafter payment was received by me from the auctioneer of the sum of — dollars (\$—) as the net proceeds of the sale.

5. On — —, 19—, — was elected trustee of the estate at the first meeting of creditors, and on — —, 19—, I turned over to him the balance of funds in my possession belonging to the estate, amounting to the sum of — dollars (\$—). Attached hereto is an itemized statement of all moneys received by me as receiver of said estate, aggregating the sum of — dollars (\$—), marked "Schedule A"; and an itemized statement of all disbursements made by me as receiver of said estate, aggregating the sum of — dollars (\$—), marked "Schedule B."

6. I have received no compensation for my services as receiver. The commissions to which I am legally entitled amount to the sum of — dollars (\$—), I also request an additional sum of — dollars (\$—), as compensation for conducting the business of the bankrupt herein.

Wherefore, I pray that my account and report as receiver be approved; that I be discharged as receiver, that my bond be canceled; and that I be paid the sum of — dollars (\$—), as commissions and compensation for my services herein.

(Verification.)

Receiver.

Statutory References.

Compensation, 3 F. C. A., Title 11, §§ 76, 76a, 102, 112; U. S. C. A., Title 11, §§ 76, 76a, 102, 112; id. U. S. C.

Compensation, notice to creditors, 3 F. C. A., Title 11, § 94; U. S. C. A., Title 11, § 94; id. U. S. C.

General Orders in Bankruptcy.

Compensation, Orders Nos. 35, 40.

NOTES TO DECISIONS**In General.**

Appointees of the court, whether receiver, trustee, or attorney, should be meticulous in keeping accurate account of the items which go to make up their

claim, and it will not do to state the services performed in a general way, and ask for a bulk allowance. In re National Accessories (D. C.-Nebr.), 13 Fed. Supp. 278.

824. Adjudication that Debtor is Not a Bankrupt.

At —, in said district, on the — day of —, 19—.

This cause having been heard at —, in said court, upon the petition of — —, — —, and — —, that — — be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and [here state the proceedings, whether there was no opposition, or, if opposed, what proceedings were had];

And, upon consideration of the proofs in said cause [and the arguments of counsel thereon, if any], it having been found that the material facts alleged in said petition were not proved;

It is adjudged that said — — is not a bankrupt as alleged, and that said petition be dismissed, with costs.

District judge or referee in bankruptcy.**Source of Form.**

Official Form No. 10, 305 U. S. 744 (3 F. C. A. [Replacement Volume], p. 332).

Statutory References.

Adjudication upon failure of arrangements by wage earner for composition of creditors, 3 F. C. A., Title 11, §§ 1066 to 1068; U. S. C. A., Title 11, §§ 1066 to 1068; id. U. S. C.

Adjudication upon failure of arrangements for reorganization, 3 F. C. A., Title 11, §§ 776 to 780; U. S. C. A., Title 11, §§ 776 to 780; id. U. S. C.

Adjudication upon failure of corporate reorganization plan, 3 F. C. A., Title 11, §§ 636 to 638; U. S. C. A., Title 11, §§ 636 to 638; id. U. S. C.

Adjudication upon failure of plan for agricultural composition and extension, 3 F. C. A., Title 11, § 203 (s); U. S. C. A., Title 11, § 203 (s), id. U. S. C.

Adjudication upon failure of real estate arrangements for reorganization, 3 F. C. A., Title 11, §§ 881 to 885; U. S. C. A., Title 11, §§ 881 to 885; id. U. S. C.

Powers of the court to make adjudication, 3 F. C. A., Title 11, §§ 11, 41; U. S. C. A., Title 11, §§ 11, 41; id. U. S. C.

825. Adjudication of Bankruptcy.

At —, in said district, on the — day of —, 19—.

The petition of — —, filed on the — day of —, 19—, that — — be adjudged a bankrupt under the Act of Congress relating to bank-

ruptcy, having been heard and duly considered; and [here state the proceedings, whether there was no opposition, or, if opposed, what proceedings were had];

It is adjudged that the said — is a bankrupt under the Act of Congress relating to bankruptcy.

District judge or referee in bankruptcy.

Source of Form.

Official Form No. 11, 305 U. S. 745 (3 F. C. A. [Replacement Volume], p. 332).

Statutory Reference.

Powers of the court to make adjudication, 3 F. C. A., Title 11, §§ 11, 41; U. S. C. A., Title 11, §§ 11, 41; id. U. S. C.

Cross-Reference.

See notes to Form 824.

826. Appointment and Oath of Appraiser.

—, of —, a disinterested person, is hereby appointed appraiser, forthwith to appraise, after having been duly sworn, all the items of real and personal property belonging to the estate of the said bankrupt, and to prepare and file with the court a report of said appraisal.

[Here set out such instructions as may be deemed appropriate for the appraisal of the property of the particular estate].

Dated at —, this — day of —, 19—.

Referee in bankruptcy.

United States of America }
— District of —. } ss:

I, —, the person above named, do hereby make solemn oath that I will fully and fairly appraise the aforesaid property according to my best skill and judgment.

Subscribed and sworn to before me this — day of —, 19—.

[Official character.]

Source of Form.

Official Form No. 12, 305 U. S. 745 (3 F. C. A. [Replacement Volume], p. 332).

Appointment of appraisers in proceedings for arrangements for reorganization, 3 F. C. A., Title 11, § 733; U. S. C. A., Title 11, § 733; id. U. S. C.

Statutory References.

Appointment of appraisers, 3 F. C. A., Title 11, § 110 (f); U. S. C. A., Title 11, § 110 (f); id. U. S. C.

Appointment of appraisers in proceedings for real estate arrangements for reorganization, 3 F. C. A., Title 11, § 833; U. S. C. A., Title 11, § 833; id. U. S. C.

Appointment of appraisers in agricultural composition and extension cases, 3 F. C. A., Title 11, § 203 (s); U. S. C. A., Title 11, § 203 (s); id. U. S. C.

General Orders in Bankruptcy.

Appointment of appraisers, Order No. 45.

827. Order of General Reference.

At —, in said district, on the — day of —, 19—.

Whereas a petition was filed in this court, on the — day of —, 19—, by [or against] — —, the bankrupt [or alleged bankrupt] above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy; [if the debtor has been adjudged a bankrupt, add: and whereas the said — — was adjudged a bankrupt, upon said petition, on the — day of —, 19—;]

It is ordered that the above entitled proceeding be, and it hereby is, referred to — —, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said — — shall henceforth attend before the said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

District Judge.

Source of Form.

Official Form No. 13, 305 U. S. 746 (3 F. C. A. [Replacement Volume], p. 332).

Statutory References.

Appointment and removal of referee, 3 F. C. A., Title 11, § 62; U. S. C. A., Title 11, § 62; id. U. S. C.

Conciliation commissioner in agricultural composition and extension cases, 3 F. C. A., Title 11, § 203a; U. S. C. A., Title 11, § 203a; id. U. S. C.

Jurisdiction and duties of referee, 3 F. C. A., Title 11, §§ 66, 67; U. S. C. A., Title 11, §§ 66, 67; id. U. S. C.

Reference of corporate reorganization proceedings, 3 F. C. A., Title 11, § 517; U. S. C. A., Title 11, § 517; id. U. S. C.

Reference of petitions for arrangements by wage earners for composition

of creditors, 3 F. C. A., Title 11, § 1031; U. S. C. A., Title 11, § 1031; id. U. S. C.

Reference of petitions for arrangements for reorganization, 3 F. C. A., Title 11, §§ 731, 737; U. S. C. A., Title 11, §§ 731, 737; id. U. S. C.

Reference of petitions for real estate arrangements for reorganization, 3 F. C. A., Title 11, §§ 831, 837; U. S. C. A., Title 11, §§ 831, 837; id. U. S. C.

Reference of petition to referee, 3 F. C. A., Title 11, §§ 11, 41, 45; U. S. C. A., Title 11, §§ 11, 41, 45; id. U. S. C.

General Orders in Bankruptcy.

Duties of referee, Order No. 12.

General provisions, concerning orders of referee, Order No. 23.

Reference of petitions in agricultural compensation and extension cases, Order No. 50 (2) (10).

NOTES TO DECISIONS**In General.**

When a bankruptcy case is referred generally to a referee, the referee has all the powers of the court for the purpose of examining witness concerning the acts, conduct, or property of the bankrupt. In *re Abbey Press* (C. C. A. 2), 134 Fed. 51, 13 Am. B. 11. Cert. den. 196 U. S. 642, 49 L. ed. 631, 25 Sup. Ct. 797.

A special reference to take testimony of bankrupt and other witnesses to discover assets is superseded by an order of

general reference. In *re Ruos* (D. C. Pa.), 164 Fed. 749, 21 Am. B. 257.

The bankruptcy proceeding may be referred to the referee by a general order, or upon special issues, his power depending upon the order of reference. In *re Sweeney* (C. C. A. 6), 168 Fed. 612, 21 Am. B. 866.

A general reference continues in force even after confirmation of a composition until no further proceedings are required by the act. *United States ex rel. O'Brien*

v. Sondheim (D. C.-Mass.), 188 Fed. 378, 33 Am. B. 217.

Reference to the referee, as special master, of motion to vacate adjudication

did not authorize the referee to stay the bankruptcy proceedings. *Woolf v. Reeves* (C. C. A. 8), 65 Fed. (2d) 80, 23 Am. B. (N. S.) 749.

828. Order of Reference in Judge's Absence.

At —, in said district, on the — day of —, 19—.

Whereas a petition was filed in this court on the — day of —, 19—, by [or against] — —, the alleged bankrupt above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district [or said division of said district] at the time of the filing of said petition [or, in case of involuntary bankruptcy, on the next day after the last day on which pleadings might have been filed, and none have been filed by the alleged bankrupt];

It is ordered that the above entitled proceeding be, and it hereby is, referred to — —, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required and permitted by said Act, and that the said — —, shall henceforth attend before said referee.

Witness my hand and the seal of the said court.

[SEAL OF THE COURT]

Clerk.

Source of Form.

Official Form No. 14, 305 U. S. 746 (3 F. C. A. [Replacement Volume], pp. 332, 333).

Statutory Reference.

Reference by clerk in absence of judge, 3 F. C. A., Title 11, § 41; U. S. C. A., Title 11, § 41; id. U. S. C.

Cross-Reference.

See notes to Form 827.

829. Referee's Oath of Office.

I, — —, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God.

Subscribed and sworn to before me this — day of —, 19—.

District judge.

Source of Form.

Official Form No. 15, 305 U. S. 747 (3 F. C. A. [Replacement Volume], p. 333).

Statutory Reference.

Oath of referee, 3 F. C. A., Title 11, § 64; U. S. C. A., Title 11, § 64; id. U. S. C.

830. Bond of Referee.

Know all men by these presents: That we, — — —, of — — —, as principal, and — — —, of — — —, and — — —, of — — —, as sureties, are held and firmly bound to the United States of America in the sum of — — — dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this — — — day of — — —, 19—.

The condition of this obligation is such that whereas the said — — —, has been on the — — — day of — — —, 19—, appointed by the Honorable — — —, Judge of the District Court of the United States for the — — — District of — — —, a referee in bankruptcy in said district, under the Act of Congress relating to bankruptcy;

Now, therefore, if the said — — — shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in
the presence of

_____ [L. s.]
_____ [L. s.]
_____ [L. s.]

Approved this — — — day of — — —, 19—.

District judge.

Source of Form.

Official Form No. 16, 305 U. S. 747 (3
F. C. A. [Replacement Volume], p. 333).

Statutory Reference.

Bond required, 3 F. C. A., Title 11, § 78;
U. S. C. A., Title 11, § 78; id. U. S. C.

831. Notice of First Meeting of Creditors.

To the creditors of — — —, of — — —, in the County of — — —, and district aforesaid, a bankrupt:

Notice is hereby given that said — — — has been duly adjudged a bankrupt on a petition filed by [or against] him on the — — — day of — — —, 19—, and that the first meeting of his creditors will be held at — — —, in — — —, on the — — — day of — — —, 19—, at — — — o'clock in the — — — noon, at which place and time the said creditors may attend, prove their claims, appoint a trustee, appoint a committee of creditors, examine the bankrupt, and transact such other business as may properly come before said meeting.

Dated at — — —, this — — — day of — — —, 19—.

Referee in bankruptcy.

Source of Form.

Official Form No. 17, 305 U. S. 748 (3 F. C. A. [Replacement Volume], p. 333).

Notice to creditors, 3 F. C. A., Title 11, § 94; U. S. C. A., Title 11, § 94; id. U. S. C.

Statutory References.

Meetings of creditors, 3 F. C. A., Title 11, § 91; U. S. C. A., Title 11, § 91; id. U. S. C.

Publication of notice, 3 F. C. A., Title 11, § 94; U. S. C. A., Title 11, § 94; id. U. S. C.

832. Power of Attorney.

To ——— and ———:

I, ———, of ———, in the County of ———, State of ———, do hereby authorize you, or any one of you, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for me and in my name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due me under such arrangement or wage-earner's plan, and for any other purpose in my interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, 19—.

_____ [L. S.]

Signed, sealed and delivered
in the presence of

Acknowledged before me this ——— day of ———, 19—.

[Official character.]

Source of Form.

Official Form No. 18, 305 U. S. 748 (3 F. C. A. [Replacement Volume], p. 333).

833. Special Power of Attorney.

To ——— and ———:

I hereby authorize you, or any one of you, to attend the meeting of creditors of the bankrupt aforesaid, advertised or directed to be held at ———, on the ——— day of ———, before ———, or any adjournment thereof,

and then and there for me and in my name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

In witness whereof I have hereunto signed my name and affixed my seal the — day of —, 19—.

[L. S.]

Signed, sealed and delivered
in the presence of

Acknowledged before me this — day of —, 19—.

[Official character.]

Source of Form.

Official Form No. 19, 305 U. S. 749 (3 F. C. A. [Replacement Volume], p. 333, 334).

834. Order Approving Appointment of Trustee.

At —, in said district, on the — day of —, 19—.

—, of —, having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It is ordered that the appointment of said —, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at — dollars.

Referee in bankruptcy.

Source of Form.

Official Form No. 20, 305 U. S. 749 (3 F. C. A. [Replacement Volume], p. 334).

Statutory References.

Appointment, 3 F. C. A., Title 11, §§ 72, 76a; U. S. C. A., Title 11, §§ 72, 76a; id. U. S. C.

Appointment of trustee in corporate reorganization proceedings, 3 F. C. A., Title 11, §§ 556 to 562; U. S. C. A., Title 11, §§ 556 to 562; id. U. S. C.

Duties, 3 F. C. A., Title 11, § 75; U. S. C. A., Title 11, § 75; id. U. S. C.

Suits by or against bankrupt, 3 F. C. A., Title 11, § 29; U. S. C. A., Title 11, § 29; id. U. S. C.

Trustee in proceedings for arrangements by wage earner for composition of creditors, 3 F. C. A., Title 11, § 1033; U. S. C. A., Title 11, § 1033; id. U. S. C.

Trustees in proceedings for arrangements for reorganization, 3 F. C. A., Title 11, §§ 732, 737, 738; U. S. C. A., Title 11, §§ 732, 737, 738; id. U. S. C.

Trustees in proceedings for real estate arrangements for reorganization, 3 F. C. A., Title 11, §§ 832, 837; U. S. C. A., Title 11, §§ 832, 837; id. U. S. C.

General Orders in Bankruptcy.

Duties of trustee, Order No. 17.

835. Appointment of Trustee by Referee.

At —, in said district, on the — day of —, 19—.

The creditors of the above named bankrupt having failed to appoint a trustee as provided in the Act of Congress relating to bankruptcy, I hereby appoint — —, of —, trustee of the estate of said bankrupt, and fix the amount of his bond at — dollars.

Referee in bankruptcy.

Source of Form.

Official Form No. 21, 305 U. S. 749 (3
F. C. A. [Replacement Volume], p. 334).

Cross-Reference.

See notes to Form 834.

836. Notice to Trustee of His Appointment.

To — —, of —:

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above named bankrupt at the first meeting of creditors, on the — day of —, 19—, and I have approved said appointment. The amount of your bond as such trustee has been fixed at — dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at —, the — day of —, 19—.

Referee in bankruptcy.

Source of Form.

Official Form No. 22, 305 U. S. 750 (3
F. C. A. [Replacement Volume], p. 334).

General Orders in Bankruptcy.

Notice of appointment, Order No. 16.

837. Bond of Receiver or Trustee.

Know all men by these presents: That we — —, of —, as principal, and — —, of —, and — —, of —, as sureties, are held and firmly bound unto the United States of America in the sum of — dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this — day of —, 19—.

The condition of this obligation is such that whereas the above named — — was, on the — day of —, 19—, appointed receiver [or trustee] in the case pending in bankruptcy in said court, wherein — — is the bankrupt, and he, the said — —, has accepted said trust with all the duties and obligations pertaining thereunto;

Now, therefore, if the said — —, receiver [or trustee] as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects

of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said receiver [or trustee], then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
the presence of

_____ [SEAL]
_____ [SEAL]
_____ [SEAL]

Source of Form.

Official Form No. 23, 305 U. S. 750 (3
F. C. A. [Replacement Volume], p. 334).

Statutory Reference.

Bond required, 3 F. C. A., Title 11, § 78;
U. S. C. A., Title 11, § 78; id. U. S. C.

838. Order Approving Trustee's Bond.

At —, in said district, on the — day of —, 19—.

The above named —, having been duly adjudged a bankrupt on a petition filed by [or against] him on the — day of —, 19—; and —, of —, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., — dollars;

It is ordered that the said bond be, and it hereby is, approved.

Referee in bankruptcy.

Source of Form.

Official Form No. 24, 305 U. S. 751 (3
F. C. A. [Replacement Volume], p. 334).

839. Motion for Order to Turn Over Property.

(Caption.)

Now comes —, the duly appointed, qualified, and acting trustee herein, and moves the court for an order directing the above-named bankrupt to turn over to the said trustee goods, wares, and merchandise of the value of — dollars (\$—) or the proceeds of the sale thereof, for which the bankrupt has failed to account, as appears by the affidavit of —, verified on —, 19—, hereto annexed.

Date—.

Attorney for trustee in bankruptcy.

Statutory Reference.

In connection with Forms 839 to 843,
see right and title to bankrupt's property,

3 F. C. A., Title 11, § 110; U. S. C. A.,
Title 11, § 110; id. U. S. C.

840. Turn Over Order.

(Caption.)

At —, in said district, on the — day of —, 19—.

Whereas, —, trustee herein, has moved this court for an order directing the bankrupt to turn over to the trustee certain merchandise alleged to be concealed by the bankrupt, and it appearing that said merchandise was received by the bankrupt as his property, but that no accounting therefor has been made, and the court being fully advised, it is

Ordered, that the bankrupt be and he is hereby directed to deliver to the trustees herein, within — days after the date hereof, the following-described property, to wit: [description of the property].

Referee in bankruptcy.

841. Petition for Turn Over Order.

(Caption.)

To the honorable —, referee in bankruptcy.

The petition of — respectfully represents:

1. That the above-named bankrupt was adjudicated a bankrupt on —, 19—.
2. That petitioner was duly elected and appointed trustee herein on —, 19—, and duly qualified and is now acting as such trustee.
3. That prior to the institution of this proceeding in bankruptcy, said bankrupt was a retail merchant engaged in the business of buying and selling men's, women's, and children's shoes and maintained a store and principal place of business at —, —.
4. That the books and records of the said bankrupt show that at the taking of stock inventory on —, 19—, the bankrupt had [quantity of merchandise] in stock at his said store; that between said date of —, 19—, and the commencement of this proceeding, bankrupt purchased and received — pairs of shoes from the — Shoe Company of —, and — pairs of shoes from the — Company of —. During said period bankrupt sold at retail not to exceed — pairs of shoes.
5. That on —, 19—, when bankrupt's store and contents were turned over to the receiver herein only — pairs of shoes were found in stock. A total of — pairs of shoes are, therefore, not accounted for. Bankrupt asserts they were delivered to the warehouse of John Doe at —.
6. On information and belief, the said John Doe has in his possession and control — pairs of shoes of the value of — dollars (\$—) which are the property of the estate herein, which he holds without color of title and without any adverse claim thereto. The said John Doe has failed and refused to surrender the said property to your petitioner although due demand therefor has been made.

Wherefore, petitioner prays for an order requiring John Doe to show cause why he should not turn over and surrender to your petitioner the above-mentioned property of the estate herein consisting of approximately — pairs of shoes.

Trustee in bankruptcy.

(Verification.)

842. Order to Show Cause on Petition for Turn Over Order.

(Caption.)

Whereas, AB, the trustee herein, has filed a petition, verified on —, —, 19—, praying for an order directing John Doe of — to show cause why he should not turn over and surrender to the said trustee certain assets of the estate herein, on motion of —, Attorney for the Trustee, it is

Ordered, that John Doe of — show cause before the undersigned referee in bankruptcy, at his office at —, on — —, 19—, at — —. M., why he should not be required to turn over and surrender to AB, the trustee herein, the property described in the annexed petition, or the proceeds of the sale thereof, and it is further

Ordered, that pending the hearing and determination of the foregoing application, the said John Doe is restrained and enjoined from conveying, transferring, assigning, or encumbering any of the property referred to above.

Date—.

Referee in bankruptcy.

843. Order to Third Person to Turn Over Property.

(Caption.)

At — in said district, on the — day of —, 19—.

Whereas on petition of — trustee herein an order was entered on the — day of —, 19—, requiring John Doe of — to show cause why he should not turn over and surrender certain property to the said trustee, and the application having come on for hearing, after hearing — Esquire, attorney for the trustee in support of said order and —, Esquire, attorney for the said John Doe in opposition thereto, it is on motion of — attorney for the trustee,

Ordered, that John Doe of — be and he is hereby directed, within — days after service on him of a copy of this order, to turn over and surrender to — trustee herein, the property described in the petition for said order to show cause, to wit: [Describe property].

Referee in bankruptcy.

844. Order that No Trustee Be Appointed.

At —, in said district, on the — day of —, 19—.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

Referee in bankruptcy.

Source of Form.

Official Form No. 25, 305 U. S. 751 (3
F. C. A. [Replacement Volume], p. 335).

General Orders in Bankruptcy.

Where trustee not appointed, Order No.
15.

845. Order for Examination of Bankrupt.

At —, in said district, on the — day of —, 19—.

Upon the application of — —, trustee of said bankrupt [or a creditor of said bankrupt], it is ordered that said bankrupt attend before — —, one of the referees in bankruptcy of this court, at —, on the — day of —, at — o'clock in the — noon, to submit to examination under the Act of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

Referee in bankruptcy.

Source of Form.

Official Form No. 26, 305 U. S. 751 (3
F. C. A. [Replacement Volume], p. 335).

U. S. C. A., Title 11, §§ 25 (a) (10),
44 (a), 91 (b); id. U. S. C.

Notice to creditors, 3 F. C. A., Title 11,
§ 94; U. S. C. A., Title 11, § 94; id. U. S. C.

Statutory Reference.

Examination of bankrupt, 3 F. C. A.,
Title 11, §§ 25 (a) (10), 44 (a), 91 (b);

NOTES TO DECISIONS**In General.**

The published and mailed notices of application for a discharge should contain a notice of examination of the debtor to

avoid the necessity of further notice to all creditors in case such examination is allowed. In re Price (D. C.-N. Y.), 91 Fed. 635, 1 Am. B. 419.

846. Subpoena to Witness.

To — —:

Whereas the above entitled proceeding is pending in the District Court of the United States for the — District of —;

You are hereby commanded personally to be and appear before — —, one of the referees in bankruptcy of said court, at —, on the — day of

—, at — o'clock in the — noon, [and bring with you —],

then and there to be examined in relation to said proceeding.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, this — day of —, 19—.

Clerk.

Source of Form.

Official Form No. 27, 305 U. S. 752 (3 F. C. A. [Replacement Volume], p. 335).

Statutory Reference.

Compelling attendance of witness, 3 F. C. A., Title 11, § 69; U. S. C. A., Title 11; § 69; id. U. S. C.

General Orders in Bankruptcy.

Issuance and form, Order No. 3.

NOTES TO DECISIONS

In General.

A subpoena issued by a referee on a blank form previously signed by the clerk was not invalid on ground that it was not made by order of the court in view of Order No. 3. In re Abbey Press (C. C. A. 2), 134 Fed. 51, 13 Am. B. 11.

The requirements of Order No. 23 as to recitals in orders made by a referee was not applicable to an order for exami-

nation of a witness. In re Abbey Press (C. C. A. 2), 134 Fed. 51, 13 Am. B. 11.

An order of the referee to a specified person directing him to appear to testify and produce books and papers did not authorize seizure of the books and papers referred to in the order. In re Davis Tailoring Co. (D. C.-N. J.), 144 Fed. 285, 16 Am. B. 486.

847. Proof of Claim by Individual.

STATE OF —, }
COUNTY OF —. } ss:

—, of No. — Street, in —, County of —, State of —, being duly sworn, deposes and says:

1. That —, the above named bankrupt, was at and before the filing by [or against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [or liable] to said deponent in the sum of — dollars.

2. That the consideration of said debt [or liability] is as follows:

3. That no part of said debt [or liability] has been paid, except —

4. That there are no set-offs or counterclaims to said debt [or liability] except —

5. That deponent does not hold, and has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received, any security

or securities for said debt [or liability], except _____

6. [If the debt or liability is founded upon an instrument of writing] That the instrument upon which said debt [or liability] is founded is attached hereto [or is lost or destroyed, as set forth in the affidavit attached hereto].

7. [If the debt is founded upon an open account] That the said debt was [or will become] due on _____ [or that the average due date thereof is _____]; that no note or other negotiable instrument has been received for such account or any part thereof [or that the said debt is evidenced by a note [or other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except _____

Creditor.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 28, 305 U. S. 752 (3 F. C. A. [Replacement Volume], p. 335).

Statutory References.

For notes concerning debts which are provable, see 3 F. C. A., Title 11, § 103, notes; U. S. C. A., Title 11, § 103, notes.

For notes concerning priority of claims, see 3 F. C. A., Title 11, § 104, notes; U. S. C. A., Title 11, § 104, notes.

For notes concerning proof of claim, see 3 F. C. A., Title 11, §§ 93, 95; U. S. C. A., Title 11, §§ 93, 95; id. U. S. C.

Creditor and stockholders in corporate reorganization proceedings, 3 F. C. A., Title 11, §§ 596 to 613; U. S. C. A., Title 11, §§ 596 to 613; id. U. S. C.

Creditors and claims in proceedings by wage-earner for composition of creditor, 3 F. C. A., Title 11, §§ 1041 to 1044; U. S. C. A., Title 11, §§ 1041 to 1044; id. U. S. C.

Creditors and claims in proceedings for real estate arrangements for reorganization, 3 F. C. A., Title 11, §§ 851 to 859;

U. S. C. A., Title 11, §§ 851 to 859; id. U. S. C.

Debts which are provable, 3 F. C. A., Title 11, § 103; U. S. C. A., Title 11, § 103; id. U. S. C.

Priority of debts, 3 F. C. A., Title 11, § 104; U. S. C. A., Title 11, § 104; id. U. S. C.

Proof of claims, 3 F. C. A., Title 11, § 93; U. S. C. A., Title 11, § 93; id. U. S. C.

Rights, duties, and liabilities of creditors and other persons in proceedings for arrangements for reorganization, 3 F. C. A., Title 11, §§ 751 to 755; U. S. C. A., Title 11, §§ 751 to 755; id. U. S. C.

Set-offs and counterclaims, 3 F. C. A., Title 11, § 108; U. S. C. A., Title 11, § 108; id. U. S. C.

Suits by or against trustee, 3 F. C. A., Title 11, § 46; U. S. C. A., Title 11, § 46; id. U. S. C.

General Orders in Bankruptcy.

General provisions concerning proof of claim, order No. 21.

List of proved claims and interests, Order No. 24.

NOTES TO DECISIONS

In General.

Where claim was for renewal note payable on demand, misstatement as to date of new note and failure to state that older

notes were overdue, did not vitiate claim. In re Stevens (D. C.-Vt.), 107 Fed. 243, 5 Am. B. 806.

In an action by wife against bankrupt and trustee to establish resulting trust in her favor, judgment in her favor was proof of her claim. *Buckingham v. Estes* (C. C. A. 6), 128 Fed. 584, 12 Am. B. 182.

If proof of claim fails to comply with 3 F. C. A., Title 11, § 93a; U. S. C. A., Title 11, § 93a; id. U. S. C., it is not entitled to allowance. In re *Coventry Evans Furn. Co.* (D. C.-N. Y.), 166 Fed. 516, 22 Am. B. 272.

A claim can not be said to be "proved" and entitled to allowance, unless proof of it is properly verified and gives sufficient facts to advise the trustee of its justice and legality, and the consideration for it. In re *United Wireless Tel. Co.* (D. C.-Maine), 201 Fed. 445, 29 Am. B. 848.

A proof of claim stating in plain language a cause of action for money loaned by the claimant to the bankrupt is sufficient under whatever classification of action it may properly fall. In this case claim was based on the common count for money had and received. *Flower v. Commercial Trust Co.* (C. C. A. 8), 223 Fed. 318, 35 Am. B. 74.

A proof of claim which does not comply with 3 F. C. A., Title 11, § 93; U. S. C. A., Title 11, § 93; id. U. S. C. is not prima facie evidence of the allegations therein made, and should not be allowed. In re *Hudson Porcelain Co.* (D. C.-N. J.), 225 Fed. 325, 35 Am. B. 18.

Referee could not refuse to file a claim because it lacked formality. In re *Drexel Hill Motor Co.* (D. C.-Pa.), 270 Fed. 673, 46 Am. B. 411.

Proof of claim and power of attorney in same instrument must comply with 3 F. C. A., Title 11, § 93; U. S. C. A., Title 11, § 93; id. U. S. C. and also with Order No. 21. In re *Saslaw* (D. C.-Ohio), 275 Fed. 587, 47 Am. B. 243.

Claim for tax "assessed for the year 1931" was supported by proof of tax assessed for the preceding year. *Commonwealth v. Meehan* (C. C. A. 1), 67 Fed. (2d) 638, 24 Am. B. (N. S.) 214. Cert. den. 291 U. S. 666, 78 L. ed. 1057, 54 Sup. Ct. 441.

Technical accuracy in stating claim is not required, and a claim sounding in tort may be allowed as a quasi contract. In re *International Match Corp.* (C. C. A. 2), 69 Fed. (2d) 73, 25 Am. B. (N. S.) 57.

Proof of claim need not necessarily be presented in the form provided, or filed in the bankruptcy court. In re *F. & W.*

Grand Properties Corp. (C. C. A. 2), 74 Fed. (2d) 224, affg. 7 Fed. Supp. 852.

Claims need not be pleaded with the technical accuracy required in a common-law declaration. *Durrance v. Collier* (C. C. A. 5), 81 Fed. (2d) 4, 30 Am. B. (N. S.) 466.

Claim which contains the necessary allegations with respect to a lien claimed will establish the claimant's right to security although not entitled "proof of secured claim." In re *Hercules Gasoline Co.* (C. C. A. 9), 91 Fed. (2d) 633, 34 Am. B. (N. S.) 591. Cert. den. 302 U. S. 755, 82 L. ed. 583, 58 Sup. Ct. 282.

Trustee would not be justified in allowing claims for "services rendered" without further particulars. *Hutson v. Coffman* (C. C. A. 9), 100 Fed. (2d) 640, 38 Am. B. (N. S.) 662.

There is no authority for practice of requiring bill of particulars of claim of creditor, whether claim is liquidated or not. In re *Noble* (D. C.-N. Y.), 15 Fed. Supp. 648, 31 Am. B. (N. S.) 578.

Proof of claim can only be evidence of the facts alleged in the claim. In re *Redmond* (D. C.-Pa.), 15 Fed. Supp. 923.

In absence of allegation that contingency on which liability of bankrupt is dependent has occurred, burden is on claimant to establish such contingency has arisen. In re *Redmond* (D. C.-Pa.), 15 Fed. Supp. 923.

Alleging Consideration.

The statement of consideration should be sufficiently specific and full to enable other creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim; if not, the proof of claim should be amended or expunged. In re *Scott* (D. C.-Tex.), 93 Fed. 418, 1 Am. B. 553; In re *Griffin* (D. C.-Mass.), 188 Fed. 389, 33 Am. B. 894; In re *Creasinger* (D. C.-Cal.), 17 Am. B. 538.

The amount advanced upon each note is the consideration of that note, and that consideration is expressly required to be stated in the proof of claim. In re *Stevens* (D. C.-Vt.), 104 Fed. 325, 5 Am. B. 11.

State of consideration required by 3 F. C. A., Title 11, § 93a; U. S. C. A., Title 11, § 93a; id. U. S. C. is more specific than would be required in a declaration in an action against the debtor. In re *Stevens* (D. C.-Vt.), 107 Fed. 243, 5 Am. B. 806.

Consideration said to be for "printing done for said bankrupt at its request

heretofore, to wit, in September 1903, as per bill rendered," was insufficient. In re Blue Ridge Packing Co. (D. C.-Pa.), 125 Fed. 619, 11 Am. B. 36.

The provision which requires the consideration to be set forth and sworn to relates to the proof of the claim, and not to the averments of the petition. In re Brett (D. C.-N. J.), 130 Fed. 981, 12 Am. B. 492.

Proofs of debt simply stating to be for "services, mdse., etc.," "bal. of wages," "bal. of professional services," and for "goods sold and delivered," were clearly defective. In re Morris (D. C.-Pa.), 154 Fed. 211, 18 Am. B. 828.

Proof of claim must state the consideration of the debt and give facts which will enable the trustee and creditors to ascertain the adequacy of consideration and the justice and legality of the claim. In re Coventry Evans Furn. Co. (D. C.-N. Y.), 166 Fed. 516, 22 Am. B. 272; In re United Wireless Tel. Co. (D. C.-Maine), 201 Fed. 445, 29 Am. B. 848.

Where statement of claim embraced items of merchandise and affidavit annexed thereto stated that the consideration of the debt was "wood pulp sold and delivered," but evidence showed that amount stated was balance of running account between bankrupt and claimant,

and that wood pulp sold did in fact constitute the consideration of a large part of the indebtedness, there was no error in failing to reject such claim. In re Watertown Paper Co. (C. C. A. 2), 169 Fed. 252, 22 Am. B. 190.

An itemized statement of claim is necessary. In re Goble Boat Co. (D. C.-N. Y.), 190 Fed. 92, 27 Am. B. 48; In re Henry Siegel Co. (D. C.-Mass.), 223 Fed. 368, 35 Am. B. 128.

General statement that the consideration of the debt is for legal services rendered during a certain period was insufficient. In re Hudson Porcelain Co. (D. C.-N. J.), 225 Fed. 325, 35 Am. B. 18.

Statement of claim and its consideration must be sufficient to enable trustee and other creditors to investigate properly its fairness and validity without undue inconvenience, and the date of claim should be shown in order to avoid the possibility of defense of statute of limitations. In re Eisenberg (D. C.-N. Y.), 251 Fed. 427, 40 Am. B. 864.

Proof of unsecured debt filed by claimant was defective where it failed to itemize the consideration for the debt upon which the claim was filed. *Hutson v. Coffman* (C. C. A. 9), 100 Fed. (2d) 640, 38 Am. B. (N. S.) 662.

848. Proof of Claim by Corporation.

STATE OF _____, }
COUNTY OF _____, } ss:

_____, of _____, in the County of _____, State of _____, being duly sworn, deposes and says:

1. That he is the _____ of _____, a corporation organized and existing under the laws of the State of _____, and carrying on business at No. _____ Street, in _____, County of _____, State of _____, and is duly authorized to make this proof of claim on its behalf.

2. That _____, the above named bankrupt, was at and before the filing by [or against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [or liable] to said corporation in the sum of _____ dollars.

3. That the consideration of said debt [or liability] is as follows:

4. That no part of said debt [or liability] has been paid, except _____

_____.

5. That there are no set-offs or counterclaims to said debt [or liability], except _____

6. That said corporation does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt [or liability] except _____

7. [If the debt or liability is founded upon an instrument of writing] That the instrument upon which said debt [or liability] is founded is attached hereto [or is lost or destroyed, as set forth in the affidavit attached hereto].

8. [If the debt is founded upon an open account] That the said debt was [or will become] due on _____ [or that the average due date thereof is _____]; that no note or other negotiable instrument has been received for such account or any part thereof [or that the said debt is evidenced by a note [or other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except _____

_____ of said corporation.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 29, 305 U. S. 753 (3 F. C. A. [Replacement Volume], pp. 335, 336).

Cross-Reference.

In connection with Forms 848 to 852, see notes to Form 847.

849. Proof of Claim by Partnership.

STATE OF _____, }
COUNTY OF _____. } ss:

_____, of _____, in the County of _____, State of _____, being duly sworn, deposes and says:

1. That he is a member of _____, a copartnership composed of deponent and _____, of _____, in the County of _____, State of _____, and carrying on business at No. _____ Street, in _____, County of _____, State of _____.

2. That _____, the above named bankrupt, was at and before the filing by [or against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [or liable] to said copartnership in the sum of _____ dollars.

3. That the consideration of said debt [or liability] is as follows:

4. That no part of said debt [or liability] has been paid, except _____.
5. That there are no set-offs or counterclaims to said debt [or liability], except _____.
6. That said copartnership does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt [or liability], except _____.
7. [If the debt or liability is founded upon an instrument of writing] That the instrument upon which said debt [or liability] is founded is attached hereto [or is lost or destroyed, as set forth in the affidavit attached hereto].
8. [If the debt is founded upon an open account] That the said debt was [or will become] due on _____ [or that the average due date thereof is_____]; that no note or other negotiable instrument has been received for such account or any part thereof [or that the said debt is evidenced by a note [or other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except _____.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 30, 305 U. S. 754 (3
F. C. A. [Replacement Volume], p. 336).

850. Proof of Claim by Agent or Attorney.

STATE OF _____, }
COUNTY OF _____ } ss:

_____, of _____, in the County of _____, State of _____, being duly sworn, deposes and says:

1. That he is the attorney [or agent] of _____, of No. _____ Street, in _____, County of _____, State of _____; that deponent is duly authorized by said _____ to make this proof of claim in his behalf; and that said proof cannot be made by said _____ in person because _____.

2. That _____, the above named bankrupt, was at and before the filing by [or against] him of the petition for adjudication of bankruptcy,

and still is, justly and truly indebted [or liable] to said ——— in the sum of ——— dollars.

3. That the consideration of said debt [or liability] is as follows:

_____.

4. That no part of said debt [or liability] has been paid, except _____.

5. That there are no set-offs or counterclaims to said debt [or liability], except _____.

6. That said ——— does not hold, and has not, nor has any person by his order, or to deponent's knowledge or belief, for his use, had or received, any security or securities for said debt [or liability], except _____.

7. [If the debt or liability is founded upon an instrument of writing] That the instrument upon which said debt [or liability] is founded is attached hereto [or is lost or destroyed, as set forth in the affidavit attached hereto].

8. [If the debt is founded upon an open account] That the said debt was [or will become] due on ——— [or that the average due date thereof is ———]; that no note or other negotiable instrument has been received for such account or any part thereof [or that the said debt is evidenced by a note [or other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except _____.

Subscribed and sworn to before me this ——— day of ———, 19—.

[Official character.]

Source of Form.

Official Form No. 31, 305 U. S. 755 (3
F. C. A. [Replacement Volume], p. 336).

851. Affidavit of Loss of Negotiable Instrument.

STATE OF ———, }
COUNTY OF ———. } ss:

———, of ———, in the County of ———, State of ———, being duly sworn, deposes and says that the note [or other negotiable instrument], the particulars whereof are underwritten, has been lost under the following circumstances: _____

_____;
and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ———, or any

person or persons to their use, to this deponent's knowledge or belief, negotiated the said note [or other negotiable instrument], nor in any manner parted with or assigned the legal or beneficial interests therein, or any part thereof; that he, this deponent, is the person now legally and beneficially interested in the same; and that the particulars of the said instrument are as follows:

Date.	When due.	Drawer or maker.	Acceptor.	Prior indorser or indorsers, if any.	Amount

Subscribed and sworn to before me, this — day of —, 19—.

[Official character.]

Source of Form.

Official Form No. 32, 305 U. S. 756 (3
F. C. A. [Replacement Volume], p. 337).

852. Order Expunging or Reducing Claim.

At —, in said district, on the — day of —, 19—.

The petition for reconsideration of the claim of — — against the estate of the above named bankrupt in the amount of — dollars having been heard on the — day of —, 19—; and due notice of said hearing having been given [here state the manner of notice] to said claimant; and upon the evidence submitted to this court upon said claim [and, if the fact be so, upon hearing counsel thereon];

It is ordered that the said claim of — — be, and it hereby is, expunged from the list of claims in this proceeding [or, reduced to — dollars and allowed at said amount].

Referee in bankruptcy.

Source of Form.

Official Form No. 33, 305 U. S. 757 (3
F. C. A. [Replacement Volume], p. 337).

853. Order for Payment of Dividends.

At —, in said district, on the — day of —, 19—.

It appearing that, pursuant to the provisions of section 65 of the Act of Congress relating to bankruptcy, a first [or further, or final] dividend should be declared and paid herein;

It is ordered that a first [or second, etc., or final] dividend of — per cent. be, and it hereby is, declared on all unsecured claims, not entitled to priority, allowed against the estate of the above named bankrupt, in accordance with the following dividend sheet:

No.	Creditors. (The names of all parties to the proof to be set forth.)	Amount of Claim Al- lowed.		Amount of Dividend.
		\$		\$

Referee in bankruptcy.

Source of Form.

Official Form No. 34, 305 U. S. 758 (3
F. C. A. [Replacement Volume], p. 337).

Statutory Reference.

Payment of dividends, 3 F. C. A., Title 11, § 105; U. S. C. A., Title 11, § 105; id. U. S. C.

Cross-Reference.

In connection with Forms 853, 854, general provisions concerning forms, see notes to Form 805.

854. Petition for Sale of Real Estate.

The petition of ———, trustee of the estate of the above named bankrupt, respectfully represents:

1. A portion of said bankrupt's estate consists of the following described real estate: [Here describe the property and any mortgages or liens thereon, and give its appraised or estimated value.]
2. In the judgment of your petitioner it will be for the benefit of said estate to sell said property at public auction, upon the following terms and conditions: _____

Wherefore your petitioner prays that he may be authorized to make sale by public auction of said real estate as aforesaid.

Trustee.

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 35, 305 U. S. 758 (3 F. C. A. [Replacement Volume], p. 338).

Statutory References.

For notes concerning sales of property, see notes to 3 F. C. A., Title 11, § 110; U. S. C. A., Title 11, § 110.

Appraisal and approval by court, 3 F. C. A., Title 11, § 110; U. S. C. A., Title 11, § 110; id. U. S. C.

Notice to creditors, 3 F. C. A., Title 11, § 94; U. S. C. A., Title 11, § 94; id. U. S. C.

General Orders in Bankruptcy.

Public or private sale, Order No. 18.

NOTES TO DECISIONS

Notice to Creditors.

Notice to lien creditor who had not filed his claim of proposed sale of assets free of liens was sufficient. In re Weeks (D. C.-Tex.), 4 Fed. Supp. 558, 23 Am. B. (N. S.) 425. Affd. 77 Fed. (2d) 754, 28 Am. B. (N. S.) 474.

Notice of creditors' meeting was insufficient notice of sale held at such meeting. In re Galouzis (D. C.-N. Y.), 10 Fed. Supp. 284, 28 Am. B. (N. S.) 513.

Notice to creditors of petition for sale of property free of liens in the form of a show-cause order, is sufficient, though it did not specifically refer to particular liens on the property. Miller v. McKenzie, 217 Cal. 389, 19 Pac. (2d) 1, 29 Am. B. (N. S.) 284.

Notice to trustee for bondholders was sufficient. Dugan v. Logan, 229 Ky. 5, 16 S. W. (2d) 763, 14 Am. B. (N. S.) 731. Cert. den. 280 U. S. 587, 74 L. ed. 636, 50 Sup. Ct. 36, 14 Am. B. (N. S.) 731.

855. Order for Sale of Real Estate.

At _____, in said district, on the _____ day of _____, 19____.

The petition of _____, trustee of the estate of the above named bankrupt, filed on the _____ day of _____, 19____, that said trustee be authorized to sell at public auction certain real estate belonging to said estate, having come on for hearing before me, of which hearing [here set forth to whom notice was given and the manner thereof], now after due hearing, no adverse interest being represented thereat [or after hearing _____ in favor of said petition and _____ in opposition thereto];

It is ordered that the said trustee be, and he hereby is, authorized to sell at public auction all that certain real estate, belonging to the estate of said bankrupt, mentioned in said petition and described as follows: _____;

upon terms and conditions as follows: _____;

and that the said trustee shall keep an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall forthwith file with this court.

Referee in bankruptcy.

Source of Form.

Official Form No. 36, 305 U. S. 759 (3
F. C. A. [Replacement Volume], p. 338).

Cross-Reference.

See notes to Form 854.

856. Petition for Redemption of Property.

The petition of ———, trustee of the estate of the above named bankrupt, respectfully represents:

1. A portion of said bankrupt's estate consists of the following described property: [Here describe the property and give its appraised or estimated value.]

2. Said property is subject to the following described mortgage [or lien or pledge]: _____

3. In the judgment of your petitioner it will be for the benefit of the estate to redeem said property from said mortgage [or lien or pledge], for the following reasons: _____

Wherefore your petitioner prays that he may be authorized to pay out of the assets of said estate the sum of ——— dollars, being the amount of said mortgage [or lien or pledge], to redeem said property therefrom.

Trustee.

STATE OF ———, }
COUNTY OF ———. } ss:

I, ———, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this ——— day of ———, 19—.

[Official character.]

Source of Form.

Official Form No. 37, 305 U. S. 760 (3
F. C. A. [Replacement Volume], p. 338).

Cross-Reference.

General provisions concerning forms,
see notes to Form 805.

Statutory Reference.

Liens and fraudulent transfers, 3 F. C
A., Title 11, § 107; U. S. C. A., Title 11,
§ 107; id. U. S. C.

General Orders in Bankruptcy.

Redemption of property and compound-
ing of claims, Order No. 28.

857. Order for Redemption of Property.

At —, in said district, on the — day of —, 19—.

The petition of — —, trustee of the estate of the above named bankrupt, filed on the — day of —, 19—, that said trustee be authorized to redeem certain property belonging to said estate, having come on for hearing before me, of which hearing [here set forth to whom notice was given and the manner thereof], now, after due hearing, no adverse interest being represented thereat [or after hearing — — in favor of said petition and — — in opposition thereto];

It is ordered that the said trustee be, and he hereby is, authorized to redeem that certain property, belonging to said estate, mentioned in said petition and described as follows: _____

_____,
from the mortgage [or lien or pledge] so mentioned and described as follows: _____

_____,
and for that purpose to pay out of the assets of said estate the said sum of — dollars.

Referee in bankruptcy.

Source of Form.

Official Form No. 38, 305 U. S. 760 (3
F. C. A. [Replacement Volume], p. 338).

Cross-Reference.

See notes to Form 862.

858. Trustee's Report of Exempt Property.

To — —, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.

General head.	Particular description.	Estimated value.	
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption		\$	
Property claimed to be exempt by State laws, with reference to the statute creating the exemption			

Dated this — day of —, 19—.

Trustee.

Source of Form.

Official Form No. 39, 305 U. S. 761 (3 F. C. A. [Replacement Volume], p. 339).

Statutory Reference.

Duty of trustee to set off debtor's exemption to him, 3 F. C. A., Title 11, § 75; U. S. C. A., Title 11, § 75; id. U. S. C.

Cross-Reference.

General provisions concerning forms, see notes to Form 805.

General Orders in Bankruptcy.

Duty of trustee to set off exempted property and to report such fact to court, Order No. 17.

859. Report of Trustee in No Asset Case.

To ———, Referee in Bankruptcy:

———, of ———, in the County of ———, State of ———, trustee of the estate of the above named bankrupt, respectfully reports that he has neither received any property nor paid any moneys on account of said estate; that he has made diligent inquiry into the whereabouts of property belonging to the said estate; and that there are no assets in said estate over and above the exemptions claimed by, and by him set aside to, the said bankrupt.

Wherefore he prays that this report be approved, and that he be discharged of his trust.

Trustee.

STATE OF ———, }
COUNTY OF ———. } ss:

I, ———, the trustee named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this ——— day of ———, 19——.

[Official character.]

Source of Form.

Official Form No. 40, 305 U. S. 762 (3 F. C. A. [Replacement Volume], p. 339).

Statutory Reference.

Duties of trustee, 3 F. C. A., Title 11, § 75; U. S. C. A., Title 11, § 75; id. U. S. C.

860. Petition for Discharge.

The petition of ———, the bankrupt above named, a corporation organized and existing under the laws of the State of ———, respectfully represents that on the ——— day of ———, 19——, a petition was filed by [or against] it, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy; that on the ——— day of ———, 19——, it was duly adjudged a bankrupt under said Act; that it has duly surrendered all its property and rights of property, and has fully complied with all the

requirements of said Act, and with all the orders of the court pertaining to its bankruptcy.

Wherefore your petitioner prays that it may be decreed by this court to have a discharge from all debts provable against its estate under said Act, except such debts as are excepted by said Act from such discharge.

By _____
 _____ of said corporation.

STATE OF _____, }
 COUNTY OF _____ } ss:

_____, being duly sworn, deposes and says that he is the _____ of _____, the petitioner named in the foregoing petition, and is duly authorized to make this affidavit on its behalf, and that the statements contained in said petition are true according to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 41, 305 U. S. 762 (3 F. C. A. [Replacement Volume], p. 339).

Cross-Reference.

General provisions concerning forms, see notes to Form 805.

Statutory References.

Revocation of discharge, 2 F. C. A., Title 11, § 33; U. S. C. A., Title 11, § 33; id. U. S. C.

Right to and terms and conditions of discharge, 3 F. C. A., Title 11, § 32; U. S. C. A., Title 11, § 32; id. U. S. C.

General Orders in Bankruptcy.

Petition for discharge, Order No. 31.

NOTES TO DECISIONS

Revocation of Discharge.

Petition to reopen estate once closed need not be of any formal or technical character, and defects may be supplied by supporting affidavits. In re Snyder (C. C. A. 9), 4 Fed. (2d) 627, 9 Am. B. (N. S.) 123. Cert. den. 269 U. S. 556, 70 L. ed. 409, 46 Sup. Ct. 19.

Petition to reopen estate must be either in itself or in connection with supporting affidavits of such persuasive character as to reasonably satisfy the court of the

requisite jurisdictional fact that certain assets were not administered. In re Snyder (C. C. A. 9), 4 Fed. (2d) 627, 9 Am. B. (N. S.) 123. Cert. den. 269 U. S. 556, 70 L. ed. 409, 46 Sup. Ct. 19.

Verification.

An application for discharge is a pleading and should be verified. In re Taylor (D. C.-Ala.), 188 Fed. 479, 26 Am. B. 143; In re Skurat (D. C.-Minn.), 14 Fed. (2d) 490, 7 Am. B. (N. S.) 176.

861. Order Fixing Time for Filing Objections to Discharge.

At _____, in said district, on the _____ day of _____, 19____.

It appearing that the above named bankrupt has been duly adjudged a bankrupt and has been duly examined at a meeting of creditors as required

by the Act of Congress relating to bankruptcy; [if the bankrupt is a corporation, add: and it further appearing that said bankrupt filed its application for a discharge on the — day of —, 19—;]

It is ordered that the — day of —, 19—, be, and it hereby is, fixed as the last day for the filing of objections to the discharge of said bankrupt.

Referee in bankruptcy.

Source of Form.

Official Form No. 42, 305 U. S. 763 (3 F. C. A. [Replacement Volume], p. 339).

Cross-Reference.

See notes to Form 863.

862. Notice of Order Fixing Time for Filing Objections to Discharge.

To the creditors of the above named bankrupt and other parties in interest:

Notice is hereby given that on the — day of —, 19—, an order was made in the above entitled proceeding, fixing the — day of —, 19—, as the last day for the filing of objections to the discharge of said bankrupt.

Dated this — day of —, 19—.

Referee in bankruptcy.

Source of Form.

Official Form No. 43, 305 U. S. 764 (3 F. C. A. [Replacement Volume], p. 340).

Statutory Reference.

Notice to creditors, 3 F. C. A., Title 11, § 94; U. S. C. A., Title 11, § 94; id. U. S. C.

NOTES TO DECISIONS

In General.

The published and mailed notices of application for discharge should contain a notice of examination of the debtor to avoid the necessity of further notice to all creditors in case such examination is allowed. In re Price (D. C.-N. Y.), 91 Fed. 635, 1 Am. B. 419.

Where partners file voluntary petitions requesting discharge from partnership and individual debts, notice to creditors

should show such facts. In re Laughlin (D. C.-Iowa), 96 Fed. 589, 3 Am. B. 1; In re Russell (D. C.-Iowa), 97 Fed. 32, 3 Am. B. 91; In re Meyers (D. C.-N. Y.), 97 Fed. 757, 3 Am. B. 260.

Notice by publication is insufficient without a showing that the addresses of such creditors can not be ascertained after diligent search and inquiry. In re Dvorak (D. C.-Iowa), 107 Fed. 76, 6 Am. B. 66.

863. Specification of Objections to Discharge.

— — —, of — — —, in the County of — — —, State of — — —, the trustee of the estate [or a creditor] of the above named bankrupt [or the United States attorney for said district [or the attorney designated by the Attorney General of the United States], having examined into the acts and conduct of said bankrupt and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt and that the public interest so warrants], does hereby oppose the granting to said bankrupt of a discharge from his

debts, and specifies the following as grounds of objection: [Here specify in separately numbered paragraphs the grounds of objection.]

Trustee [or creditor, etc.]

STATE OF _____, }
COUNTY OF _____ } ss:

I, _____, the trustee [or creditor, etc.] named in the foregoing petition do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Trustee [or creditor, etc.]

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 44, 305 U. S. 764 (3 F. C. A. [Replacement Volume], p. 340).

Cross-Reference.

General provisions concerning forms, see notes to Form 805.

Statutory Reference.

Objections, 3 F. C. A., Title 11, § 32; U. S. C. A., Title 11, § 32; id. U. S. C.

General Orders in Bankruptcy.

Opposition to discharge, specifications in writing, Order No. 32.

NOTES TO DECISIONS

In General.

Specifications of objections to discharge should distinctly state the particular grounds relied upon to defeat same. In re Hixon (D. C.-Iowa), 93 Fed. 440, 1 Am. B. 610; In re Servis (D. C.-Iowa), 140 Fed. 222, 15 Am. B. 271; In re Slatkin (D. C.-Mich.), 286 Fed. 242, 4 Am. B. (U. S.) 24; In re Little (C. C. A. 2), 65 Fed. (2d) 777, 23 Am. B. (N. S.) 507, revg. (D. C.-N. Y.), 2 Fed. Supp. 264; In re Huntley (D. C.-Mass.), 14 Fed. Supp. 784. Affd. 86 Fed. (2d) 539, 32 Am. B. (N. S.) 535. Reh. den. 88 Fed. (2d) 335, 33 Am. B. (N. S.) 639.

Exceptions must be filed before the judge. Mahoney v. Ward (D. C.-N. Car.), 100 Fed. 278, 3 Am. B. 770.

"The opposing creditor or creditors must distinctly allege and prove one (or more) of the statutory grounds for refusing a discharge." In re McGurn (D. C.-Nev.), 102 Fed. 743, 4 Am. B. 459.

Objection charging bankrupt committed crime of perjury in testimony before referee is not sufficient even though it asks that "the stenographer's minutes

of said testimony be referred to for the details of such perjury." In re Goodale (D. C.-N. Y.), 109 Fed. 783, 6 Am. B. 493.

Specifications of objections to discharge because of false oath should charge that the same was made knowingly and fraudulently. In re Beebe (D. C.-Pa.), 116 Fed. 48, 8 Am. B. 597.

Objection to discharge "that the bankrupt in consideration of bankruptcy, had conveyed his real property by written assignment to strangers for an adequate consideration, for the purpose of defrauding his creditors" and that the conveyance was merely in trust to be reconveyed as soon as the petition for discharge is granted, was insufficient. In re Parish (D. C.-Iowa), 122 Fed. 553, 13 Am. B. 312.

A concealment of bankrupt's property, in order to be a sufficient ground for refusing discharge, must have been knowingly and fraudulently made. In re Griffin (D. C.-Ala.), 154 Fed. 537, 19 Am. B. 78.

Specifications of objections on ground of obtaining property by false pretenses

should charge that false statements were made in writing. In re Lewis (D. C.-N. Y.), 163 Fed. 137, 20 Am. B. 711.

Where an objection stated that bankrupt with intent to conceal his financial condition either destroyed or failed to keep account books or records from which his financial condition might be determined, it was not defective for uncertainty. In re Brod (D. C.-Ga.), 166 Fed. 1011, 21 Am. B. 426.

"A specification following the language of the statute and covering non-keeping, concealment or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in this respect." In re Magen Bros. Co. (C. C. A. 3), 192 Fed. 883, 27 Am. B. 729.

Specification stating that bankrupt obtained property from the objecting other creditors upon a material false statement for purpose of obtaining credit, without showing to whom the statement was made, from whom the goods were obtained or what the false statement was, was insufficient. In re Epstein (D. C.-Fla.), 248 Fed. 191, 40 Am. B. 406; In re Wood (D. C.-N. H.), 283 Fed. 565, 49 Am. B. 608.

Objections should specify the money or property obtained. In re Troutman (D. C.-Ky.), 251 Fed. 930, 40 Am. B. 418.

Specification that bankrupt had not given correct amount of value of his property does not sufficiently charge concealment of assets. In re Phillips (D. C.-Ohio), 298 Fed. 135, 3 Am. B. (N. S.) 33.

Specifications which were held sufficient are found in In re Hyers (D. C.-N. Y.), 4 Fed. (2d) 712.

Objection defining precisely the property concealed and alleging that the bankrupts concealed it advisedly was sufficient. In re Feuer (C. C. A. 2), 4 Fed. (2d) 892, 4 Am. B. (N. S.) 718.

Specifications were insufficient to show any offense against the Bankruptcy Act. In re Ward (D. C.-La.), 11 Fed. (2d) 371, 7 Am. B. (N. S.) 845.

General specification of failure to schedule debts without showing intent was insufficient. In re Applebaum (C. C. A. 2), 11 Fed. (2d) 685, 7 Am. B. (N. S.) 732.

Specification requires almost same strictness as if prosecution was pending for the offense. In re Ishear (D. C.-Fla.), 16 Fed. (2d) 285, 8 Am. B. (N. S.) 693.

The objection need not allege that property was knowingly and fraudulently con-

cealed. In re Levy (C. C. A. 6), 16 Fed. (2d) 693, 9 Am. B. (N. S.) 317.

Specification that bankrupt obtained merchandise and property on false financial statement was sufficient. In re Licht (D. C.-N. Y.), 45 Fed. (2d) 844, 17 Am. B. (N. S.) 81.

Specification alleging that within 11 months before filing of his petition, the bankrupt had concealed property, with intent to hinder, delay, and defraud his creditors, by a transfer to a corporation which he controlled, and that the objector was a creditor at the time of the transfer was sufficient. Grande v. Arizona Wax Paper Co. (C. C. A. 9), 90 Fed. (2d) 801, 34 Am. B. (N. S.) 347.

Specification that "with intent to conceal its true financial condition, it has failed to keep books of account or records, or has destroyed and concealed books of account and records from which said financial condition might be ascertained" was sufficient. In re Oceanside Nat. Corp. (D. C.-N. Y.), 2 Fed. Supp. 504, 22 Am. B. (N. S.) 697.

Specifications must set forth the essential facts alleged in bar of a discharge, and it is not sufficient to state such objections in the language of the statute merely. In re McLaughlin (D. C.-N. Y.), 4 Fed. Supp. 107, 23 Am. B. (N. S.) 150.

Creditor's specifications alleging a claim for wilful and malicious injuries to property did not defeat right of discharge. In re Colao (D. C.-N. Y.), 10 Fed. Supp. 406, 26 Am. B. 728.

Objection made in words substantially those of the statute was sufficient. In re Smith (D. C.-N. J.), 13 Fed. Supp. 20, 30 Am. B. (N. S.) 88.

Specification as to the concealment or destruction of books and records is not insufficient because it fails to specify exactly what books and records were concealed and destroyed. In re Wilson (D. C.-N. Y.), 19 Fed. Supp. 807, 34 Am. B. (N. S.) 171.

A specification which pleads bankrupt's failure to explain a loss or deficiency of his assets merely in the language of the statute is insufficient, where no facts are alleged to apprise the bankrupt fairly of the charges against him. In re Goldstein (D. C.-N. Y.), 20 Fed. Supp. 403, 34 Am. B. (N. S.) 414.

Verification.

Opposition to a bankrupt's discharge must be verified to prevent the interposi-

tion of frivolous objections and waste of time. In re Brown (C. C. A. 5), 112 Fed. 49, 7 Am. B. 252.

Specifications of objections to the discharge of a bankrupt are pleadings, and as a rule should be signed by objecting creditors and verified by some person having knowledge of the facts; if counsel sign and swear to them, the reason for this unusual practice should be stated. In re Baerncopf (D. C.-Pa.), 117 Fed. 975, 9 Am. B. 133.

Specification of objections in opposition to discharge need not be verified. In re Jamieson (D. C.-Ill.), 120 Fed. 697, 9 Am. B. 681.

Opposition to discharge which sets up facts must be verified, but failure may be cured by amendment. In re Gift (D. C.-Pa.), 130 Fed. 230, 12 Am. B. 244.

Specifications of objection to bankrupt's discharge are pleadings and must be verified by positive oath. In re Abramovitz (D. C.-Fla.), 253 Fed. 299, 41 Am. B. 588.

If verification of objections is required, it is so far a matter of form that upon application it may be supplied by amendment. In re Wood (D. C.-N. H.), 283 Fed. 565, 49 Am. B. 608; In re Grossberg (D. C.-Fla.), 11 Fed. (2d) 329, 7 Am. B. (N. S.) 372.

Opposition to discharge must be positively verified, and verification on information and belief is insufficient, but verification by attorney who has personal knowledge of facts is permissible. In re Slatkin (D. C.-Mich.), 236 Fed. 242, 4 Am. B. (N. S.) 24.

Specifications of objections to discharge need not be verified but it is better practice. Koch v. Sidney Blumenthal & Co. (C. C. A. 1), 3 Fed. (2d) 395, 3 Am. B. (N. S.) 595.

Verification of objections to discharge on information and belief was sufficient. In re Mason (D. C.-Fla.), 8 Fed. (2d) 665, 6 Am. B. (N. S.) 387.

Authorization by telegram to vote at creditors' meeting was insufficient to support verification of opposition to discharge. In re Romick (D. C.-Tex.), 9 Fed. (2d) 90, 7 Am. B. (N. S.) 32.

Specifications of objections to bankrupt's discharge must be verified. Manson v. Inge (C. C. A. 4), 13 Fed. (2d) 567, 47 A. L. R. 635, 8 Am. B. (N. S.) 223; In re Ishear (D. C.-Fla.), 16 Fed. (2d) 285, 8 Am. B. (N. S.) 693. Compare, Koch v. Sidney Blumenthal Co. (C. C. A. 1), 3 Fed. (2d) 395, 3 Am. B. (N. S.) 595.

864. Discharge of Bankrupt.

At —, in said district, on the — day of —, 19—.

It appearing that —, of —, in the County of —, State of —, was duly adjudged a bankrupt on a petition filed by [or against] him on the — day of —, 19—; and

It further appearing that, after due notice by mail, no objection to the discharge of said bankrupt was filed within the time fixed by the court [or objections to the discharge of the said bankrupt were filed and, after due notice by mail, were heard and were not sustained];

It is ordered that the said — be, and he hereby is, discharged from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

Referee in bankruptcy.

Source of Form.

Official Form No. 45, 305 U. S. 765 (3 F. C. A. [Replacement Volume], p. 340).

Statutory Reference.

Discharge when granted, 3 F. C. A., Title 11, § 32; U. S. C. A., Title 11, § 32; id. U. S. C.

Revocation of discharge, 3 F. C. A., Title 11, § 33; U. S. C. A., Title 11, § 33; id. U. S. C.

Source of Form.

General Orders in Bankruptcy.

Official Form No. 46, 305 U. S. 766 (3
F. C. A. [Replacement Volume], p. 341).

Accounts of referee, Order No. 26.

866. Referee's Financial Statement.

District Court of the United States for the — District of —.

Made by — —, Referee, for period ending —.

Balance brought forward from last report..... \$ —

Receipts during period:

Compensation of Referee..... \$ —

Indemnity, Costs, etc..... —

Total \$ —

Total to be accounted for..... \$ —

Disbursements during period:

Compensation of Referee:

Statutory fees received from clerk..... \$ —

Commissions —

Claims fees —

Fees as special master..... —

Other items —

Total \$ —

Office and Travel Expense:

Office rent \$ —

Clerical assistance —

Telephone and Telegraph..... —

Office supplies and equipment..... —

Travel expense —

Miscellaneous —

Total \$ —

Publishing and Printing Expense..... \$ —

Other disbursements \$ —

Refunds \$ —

Total disbursements \$ —

Unexpended balance \$ —

Amount on deposit, at close of business, — —, 19—, with

(Name of Bank) (Location)

Outstanding checks:

No. — Amount \$ —

— —

— —

Total amount of outstanding checks..... \$ —

Net bank balance..... —

Cash on hand, if any..... —

Total balance as shown by cash book..... —

Source of Form.

Official Form No. 47, 305 U. S. 767 (3
F. C. A. [Replacement Volume], p. 342).

General Orders in Bankruptcy.

Accounts of referee, Order No. 26.

867. Original Petition in Proceedings Under Chapter XI.

To the Honorable — —, Judge of the District Court of the United
States for the — District of —:

The petition of — —, of —, in the County of —, State of —,
by occupation a — [or engaged in the business of —], respectfully
represents:

1. Your petitioner has had his principal place of business [or has re-
sided, or has had his domicile] at —, within the above judicial district, for
a longer portion of the six months immediately preceding the filing of this
petition than in any other judicial district.

2. No bankruptcy proceeding, initiated by a petition by or against your
petitioner, is now pending.

3. Your petitioner is insolvent [or unable to pay his debts as they
mature], and proposes the following arrangement with his unsecured
creditors: _____

4. The schedule hereto annexed, marked Schedule A, and verified by your
petitioner's oath, contains a full and true statement of all his debts, and,
so far as it is possible to ascertain, the names and places of residence of his
creditors, and such further statements concerning said debts as are required
by the provisions of the Act of Congress relating to bankruptcy.

5. The schedule hereto annexed, marked Schedule B, and verified by
your petitioner's oath, contains an accurate inventory of all his property,
real and personal, and such further statements concerning said property
as are required by the provisions of said Act.

6. The statement hereto annexed, marked Exhibit 1, and verified by
your petitioner's oath, contains a full and true statement of all his execu-
tory contracts, as required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 2, and verified by
your petitioner's oath, contains a full and true statement of his affairs, as
required by the provisions of said Act.

Wherefore your petitioner prays that proceedings may be had upon this
petition in accordance with the provisions of chapter XI of the Act of
Congress relating to bankruptcy.

Petitioner.

_____, Attorney.

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Petitioner.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

Source of Form.

Official Form No. 48, 305 U. S. 768 (3 F. C. A. [Replacement Volume], p. 342).

Note.

Annex schedules corresponding to schedules under Forms 805 to 807.

Cross-References.

General forms may be used where applicable, Forms 805 to 882.

General provisions concerning forms, see notes to Form 805.

Statutory References.

Definition of terms, 3 F. C. A., Title 11, §§ 706 to 708; U. S. C. A., Title 11, §§ 706 to 708; id. U. S. C.

General provision and forms in bankruptcy apply except where inconsistent with the provisions of U. S. C., Title 11,

§§ 701-799; 3 F. C. A., Title 11, § 702; U. S. C. A., Title 11, § 702; id. U. S. C.

Jurisdiction, powers, and duties of the court, 3 F. C. A., Title 11, §§ 711 to 716, 737; U. S. C. A., Title 11, §§ 711 to 716, 737; id. U. S. C.

Management, control, possession, and administration of estate, 3 F. C. A., Title 11, §§ 741 to 744; U. S. C. A., Title 11, §§ 741 to 744; id. U. S. C.

Petition in pending proceedings, original petition, contents of petitions, 3 F. C. A., Title 11, §§ 721 to 724; U. S. C. A., Title 11, §§ 721 to 724; id. U. S. C.

General Orders in Bankruptcy.

General Orders not inconsistent with 3 F. C. A., Title 11, §§ 701 to 799; U. S. C. A., Title 11, §§ 701 to 799; id. U. S. C., apply, except Orders Nos. 18, 28, and 29, see Order No. 48.

868. Notice of Meeting of Creditors in Proceedings Under Chapter XI.

To the creditors of _____, of _____, in the County of _____, and district aforesaid:

Notice is hereby given that on the _____ day of _____, 19____, the said _____ filed a petition in this court proposing an arrangement with his unsecured creditors under the provisions of chapter XI of the Act of Congress relating to bankruptcy, and that a meeting of his creditors will be held at _____, in _____, on the _____ day of _____, 19____, at _____ o'clock in the _____noon, at which place and time the said creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor, present written acceptances of the proposed arrangement, and transact such other business as may properly come before said meeting.

Annexed hereto is a copy of said proposed arrangement, a summary of the liabilities of said debtor as shown by his schedules, and a summary of

the appraisal of the property of said debtor [or a summary of the assets of said debtor as shown by his schedules].

[If appropriate, the following may be added:]

Notice is also hereby given that the application to confirm said arrangement shall be filed with this court on or before the — day of —, 19—; and that the hearing on the confirmation and objections thereto, if any, will be held at —, in —, on the — day of —, 19—, at — o'clock in the —noon.

Dated this — day of —, 19—.

Referee in bankruptcy.

Source of Form.

Official Form No. 49, 305 U. S. 769 (3 F. C. A. [Replacement Volume], p. 343).

Statutory References.

Notices to creditors, 3 F. C. A., Title 11, §§ 715, 734, 735, 792; U. S. C. A., Title 11, §§ 715, 734, 735, 792; id. U. S. C.

Cross-Reference.

See notes to Form 867.

869. Application for Confirmation of an Arrangement Under Chapter XI.

To — —, Referee in Bankruptcy:

— —, the above named debtor, respectfully represents that the arrangement under chapter XI of the Act of Congress relating to bankruptcy, proposed in the petition filed by him on the — day of —, 19—, has been duly accepted, in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter and by the said arrangement, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court.

Wherefore the said — prays that the said arrangement be confirmed by the court.

Debtor.

STATE OF —, }
COUNTY OF —. } ss:

I, — —, the debtor named in the foregoing application, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Debtor.

Subscribed and sworn to before me this — day of —, 19—.

[Official character.]

Source of Form.

Official Form No. 50, 305 U. S. 770 (3 F. C. A. [Replacement Volume], p. 343).

Cross-Reference.

See notes to Form 867.

Statutory References.

Adjudication of bankruptcy upon failure of arrangements, 3 F. C. A., Title 11, §§ 776 to 780; U. S. C. A., Title 11, §§ 776 to 780; id. U. S. C.

Confirmation of arrangements, 3 F. C. A., Title 11, §§ 761 to 772; U. S. C. A., Title 11, §§ 761 to 772; id. U. S. C.

Fixing time for application and hearing of objections thereon, 3 F. C. A., Title 11, § 737; U. S. C. A., Title 11, § 737; id. U. S. C.

Modifying or setting aside arrangements, 3 F. C. A., Title 11, § 786; U. S. C. A., Title 11, § 786; id. U. S. C.

Provisions of arrangements, permissible provisions, 3 F. C. A., Title 11, §§ 756, 757; U. S. C. A., Title 11, §§ 756, 757; id. U. S. C.

870. Order Confirming an Arrangement Under Chapter XI. (Where All Affected Creditors Have Accepted.)

At —, in said district, on the — day of —, 19—.

A petition having been filed herein on the — day of —, 19—, by the above named debtor, proposing an arrangement under chapter XI of the Act of Congress relating to bankruptcy, and said arrangement having been accepted in writing by all creditors affected thereby, at a meeting of creditors held on the — day of —, 19—, of which meeting — days' notice by mail was given to said debtor, to his creditors, and to other parties in interest; and

It appearing that the deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court, and that said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said arrangement be, and it hereby is, confirmed.

Referee in bankruptcy.

Source of Form.

Official Form No. 51, 305 U. S. 770 (3 F. C. A. [Replacement Volume], p. 343).

Cross-Reference.

In connection with Forms 870, 871, see notes to Forms 867, 869.

871. Order Confirming an Arrangement Under Chapter XI. (Where Less than All Affected Creditors Have Accepted.)

At —, in said district, on the — day of —, 19—.

The application of —, the above named debtor, for confirmation of the arrangement under chapter XI of the Act of Congress relating to bankruptcy, proposed by said debtor in the petition filed by him on the — day of —, 19—, having been heard and duly considered; and due notice of said hearing having been given [here state the manner of notice]; and [here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had]; and

It appearing that said arrangement has been duly accepted in accordance with the provisions of said chapter, and that the said deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court; and

It further appearing that the provisions of said chapter have been complied with; that the arrangement is for the best interests of the creditors of said debtor; that the arrangement is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said arrangement be, and it hereby is, confirmed.

Referee in bankruptcy.

Source of Form.

Official Form No. 52, 305 U. S. 771 (3
F. C. A. [Replacement Volume], p. 343).

872. Original Petition in Proceedings Under Chapter XII.

To the Honorable — —, Judge of the District Court of the United
States for the — District of —:

The petition of — —, of —, in the County of —, State of —,
by occupation a — [or engaged in the business of —], respectfully
represents:

1. Your petitioner has had his principal place of business [or has resided, or has had his domicile] at —, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner is the legal [or equitable] owner, as more fully set forth in the arrangement hereinafter proposed, of the real property [or chattel real] described in, and which is security for debts dealt with by, said arrangement, and has an interest in said property other than a right to redeem it from a sale had before the filing of this petition.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent [or unable to pay his debts as they mature], and proposes the following arrangement with his creditors: —

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XII of the Act of Congress relating to bankruptcy.

Petitioner.

_____, Attorney.

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Petitioner.

Subscribed and sworn to before me this ____ day of _____, 19____.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

Source of Form.

Official Form No. 53, 305 U. S. 772 (3 F. C. A. [Replacement Volume], p. 344).

Note.

Annex schedules corresponding to schedules under Forms 805 to 807.

Cross-Reference.

General provisions concerning forms, see notes to Form 805.

Statutory References.

Definition of terms, 3 F. C. A., Title 11, §§ 806, 807; U. S. C. A., Title 11, §§ 806, 807; id. U. S. C.

General forms may be used where applicable, 3 F. C. A., Title 11, § 802; U. S. C. A., Title 11, § 802; id. U. S. C.

Jurisdiction, power, and duties of court, 3 F. C. A., Title 11, §§ 811 to 816, 837; U. S. C. A., Title 11, §§ 811 to 816, 837; id. U. S. C.

Management, control, possession, and administration of estate, 3 F. C. A., Title 11, §§ 841 to 846; U. S. C. A., Title 11, §§ 841 to 846; id. U. S. C.

Petition in pending proceedings, original petition, contents of petition, 3 F. C. A., Title 11, §§ 821 to 824; U. S. C. A., Title 11, §§ 821 to 824; id. U. S. C.

General Orders in Bankruptcy.

General Orders not inconsistent with U. S. C., Title 11, §§ 801-926, apply, except Orders Nos. 17, 18, 21, 28, and 29, see Order No. 54.

873. Notice of Meeting of Creditors in Proceedings Under Chapter XII.

To the creditors of —, of —, in the County of —, in the district aforesaid:

Notice is hereby given that on the — day of —, 19—, the said — filed a petition in this court proposing an arrangement with his creditors under the provisions of chapter XII of the Act of Congress relating to bankruptcy, and that a meeting of his creditors will be held at —, in —, on the — day of —, 19—, at — o'clock in the —noon, at which place and time the said creditors may attend, prove their claims, examine the debtor, present written acceptances of the proposed arrangement, and transact such other business as may properly come before said meeting.

Annexed hereto is a copy of said proposed arrangement, a summary of the liabilities of said debtor as shown by his schedules, and a summary of the appraisal of the property of said debtor [or a summary of the assets of said debtor as shown by his schedules].

[If appropriate, the following may be added:]

Notice is also hereby given that the application to confirm said arrangements shall be filed with this court on or before the — day of —, 19—; and that the hearing on the confirmation and objections thereto, if any, will be held at —, in —, on the — day of —, 19—, at — o'clock in the —noon.

Dated this — day of —, 19—.

Referee in bankruptcy.

Source of Form.

Official Form No. 54, 305 U. S. 773 (3 F. C. A. [Replacement Volume], p. 344).

Statutory Reference.

Notice to creditors, 3 F. C. A., Title 11, §§ 815, 834, 835; U. S. C. A., Title 11, §§ 815, 834, 835; id. U. S. C.

Cross-Reference.

In connection with Forms 873, 874, see notes to Form 872.

874. Application for Confirmation of an Arrangement Under Chapter XII.

To —, Referee in Bankruptcy:

—, the above named debtor, respectfully represents that the arrangement under chapter XII of the Act of Congress relating to bankruptcy, proposed in the petition filed by him on the — day of —, 19—, has been duly accepted, in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter and by the said arrangement, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court.

Wherefore the said — prays that the said arrangement be confirmed by the court.

Debtor.

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the debtor named in the foregoing application, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Debtor.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

Source of Form.

Official Form No. 55, 305 U. S. 774 (3 F. C. A. [Replacement Volume], p. 344).

Fixing time for application and hearing of objections thereto, 3 F. C. A., Title 11, § 837; U. S. C. A., Title 11, § 837; id. U. S. C.

Statutory References.

Adjudication of bankruptcy upon failure of arrangements, 3 F. C. A., Title 11, §§ 881 to 885; U. S. C. A., Title 11, §§ 881 to 885; id. U. S. C.

Modifying or setting aside arrangements, 3 F. C. A., Title 11, § 911; U. S. C. A., Title 11, § 911; id. U. S. C.

Confirmation of arrangements, 3 F. C. A., Title 11, §§ 866 to 877; U. S. C. A., Title 11, §§ 866 to 877; id. U. S. C.

Provisions of arrangements, required and permitted provisions, 3 F. C. A., Title 11, § 861; U. S. C. A., Title 11, § 861; id. U. S. C.

875. Order Confirming an Arrangement Under Chapter XII. (Where All Affected Creditors Have Accepted.)

At _____, in said district, on the _____ day of _____, 19____.

A petition having been filed herein on the _____ day of _____, 19____, by the above named debtor, proposing an arrangement under chapter XII of the Act of Congress relating to bankruptcy, and said arrangement having been accepted in writing by all creditors affected thereby, at a meeting of creditors held on the _____ day of _____, 19____, of which meeting _____ days' notice by mail was given to said debtor, to his creditors, and to other parties in interest; and

It appearing that the deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of _____ dollars, has been deposited, subject to the order of the court, in _____, of _____, the depository designated by the court, and that said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said arrangement be, and it hereby is, confirmed.

Referee in bankruptcy.

Source of Form.

Official Form No. 56, 305 U. S. 775 (3 F. C. A. [Replacement Volume], p. 345).

Cross-Reference.

In connection with Forms 875, 876, see notes to Forms 872, 874.

876. Order Confirming an Arrangement Under Chapter XII. (Where Less than All Affected Creditors Have Accepted.)

At —, in said district, on the — day of —, 19—.

The application of — —, the above named debtor, for confirmation of the arrangement under chapter XII of the Act of Congress relating to bankruptcy, proposed by said debtor in the petition filed by him on the — day of —, 19—, having been heard and duly considered; and due notice of said hearing having been given [here state the manner of notice]; and [here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had]; and

It appearing that said arrangement has been duly accepted in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter and by said arrangement, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court; and

It further appearing that the provisions of said chapter have been complied with; that the arrangement is for the best interests of the creditors of said debtor; that the arrangement is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act; and that all payments made or promised by the debtor, by any person issuing securities or acquiring property under the arrangement, or by any other person, for services and for costs and expenses in, or in connection with, this proceeding, or in connection with and incident to the arrangement, have been fully disclosed to the court and are reasonable [or, if to be fixed after confirmation of the arrangement, will be subject to the approval of the court];

It is ordered that the said arrangement be, and it hereby is, confirmed.

Referee in bankruptcy.

Source of Form.

Official Form No. 57, 305 U. S. 775 (3
F. C. A. [Replacement Volume], p. 345).

877. Original Petition in Proceedings Under Chapter XIII.

To the Honorable — —, Judge of the District Court of the United States for the — District of —:

The petition of — —, of —, in the County of —, State of —, by occupation a —, and employed by — —, respectfully represents:

1. Your petitioner has resided [or has had his domicile] at —, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner works for wages [or salary, or hire] at a rate of compensation which, when added to all his other income, does not exceed \$3,600 per year.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent [or unable to pay his debts as they mature], and desires to effect a composition [or an extension of time to pay his debts, or a composition and an extension of time to pay his debts] out of his future earnings.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XIII of the Act of Congress relating to bankruptcy.

Petitioner.

_____, Attorney.

STATE OF _____, }
COUNTY OF _____. } ss:

I, _____, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Petitioner.

Subscribed and sworn to before me this _____ day of _____, 19____.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

Source of Form.

Official Form No. 58, 305 U. S. 776 (3 F. C. A. [Replacement Volume], p. 345).

Note.

Annex schedules corresponding to schedules under Forms 805 to 807.

Cross-References.

General forms may be used where applicable, Forms 805 to 866.

General provisions concerning forms, see notes to Form 805.

Statutory References.

Definition of terms, 3 F. C. A., Title 11, §§ 1006, 1007; U. S. C. A., Title 11, §§ 1006, 1007; id. U. S. C.

General provisions and forms in bankruptcy apply except where inconsistent with the provisions of U. S. C., Title 11,

§§ 1061-1086, 3 F. C. A., Title 11, § 1002; U. S. C. A., Title 11, § 1002; id. U. S. C.

Jurisdiction, powers, and duties of the court, 3 F. C. A., Title 11, §§ 1011 to 1016, 1033; U. S. C. A., Title 11, §§ 1011 to 1016, 1033; id. U. S. C.

Management, control, possession, and administration of estate, 3 F. C. A., Title 11, §§ 1036, 1037; U. S. C. A., Title 11, §§ 1036, 1037; id. U. S. C.

Petition in pending proceedings, original petition, contents of petition, 3 F. C. A., Title 11, §§ 1021 to 1024; U. S. C. A., Title 11, §§ 1021 to 1024; id. U. S. C.

General Orders in Bankruptcy.

General Order not inconsistent with U. S. C., Title 11, §§ 1001-1086, apply, except Orders Nos. 14, 18, and 28, see Order No. 55.

878. Notice of Meeting of Creditors in Proceedings Under Chapter XIII.

To the creditors of ———, of ———, in the County of ———, and district aforesaid:

Notice is hereby given that on the ——— day of ———, 19——, the said ——— filed a petition in this court stating that he desires to effect a composition or an extension of time to pay his debts out of his future earnings and praying that proceedings be had upon his petition in accordance with the provisions of chapter XIII of the Act of Congress relating to bankruptcy; and that a meeting of his creditors will be held at ———, in ———, on the ——— day of ———, 19——, at ——— o'clock in the ——— noon, at which place and time the said debtor shall submit his plan for a composition or extension, and the said creditors may attend, prove their claims, examine the debtor, present written acceptances of the plan proposed by him, and transact such other business as may properly come before said meeting.

[If appropriate, the following may be added:]

Notice is also hereby given that the application to confirm said plan shall be filed with this court on or before the ——— day of ———, 19——; and that the hearing on the confirmation and objections thereto, if any, will be held at ———, in ———, on the ——— day of ———, 19——, at ——— o'clock in the ——— noon.

Dated this ——— day of ———, 19——.

Referee in bankruptcy.

Source of Form.

Official Form No. 59, 305 U. S. 778 (3 F. C. A. [Replacement Volume], p. 346).

Cross-Reference.

In connection with Forms 878, 879, see notes to Form 877.

Statutory Reference.

Notices to creditors, 3 F. C. A., Title 11, §§ 1015, 1032, 1033, 1077; U. S. C. A., Title 11, §§ 1015, 1032, 1033, 1077; id. U. S. C.

879. Application for Confirmation of an Arrangement Under Chapter XIII.

To ———, Referee in Bankruptcy:

———, the above named debtor, respectfully represents that the plan under chapter XIII of the Act of Congress relating to bankruptcy, submitted by him at a meeting of his creditors on the ——— day of ———, 19—, has been duly accepted, in accordance with the provisions of said chapter, and that he has made the deposit of moneys required by the provisions of said chapter [If it be the fact add: and that the deposit required by the provisions of said plan, amounting to the sum of ——— dollars, has been deposited, subject to the order of the court, in ———, of ———, the depository designated by the court].

Wherefore the said ——— prays that the said plan be confirmed by the court.

Debtor.

STATE OF ———, }
COUNTY OF ———. } ss:

I, ———, the debtor named in the foregoing application, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Debtor.

Subscribed and sworn to before me this ——— day of ———, 19—.

[Official character.]

Source of Form.

Official Form No. 60, 305 U. S. 778 (3 F. C. A. [Replacement Volume], p. 346).

Statutory References.

Adjudication of bankruptcy upon failure of plan, 3 F. C. A., Title 11, §§ 1066 to 1068; U. S. C. A., Title 11, §§ 1066 to 1068; id. U. S. C.

Confirmation of plan, 3 F. C. A., Title 11, §§ 1051 to 1062; U. S. C. A., Title 11, §§ 1051 to 1062; id. U. S. C.

Fixing time for application and hearing of objections thereon, 3 F. C. A., Title 11, § 1033; U. S. C. A., Title 11, § 1033; id. U. S. C.

Modifying or setting aside arrangements, 3 F. C. A., Title 11, § 1071; U. S. C. A., Title 11, § 1071; id. U. S. C.

Provisions of plan, required and permitted provisions, 3 F. C. A., Title 11, § 1046; U. S. C. A., Title 11, § 1046; id. U. S. C.

880. Order Confirming a Plan Under Chapter XIII. (Where All Affected Creditors Have Accepted.)

At ———, in said district, on the ——— day of ———, 19—.

The plan of ———, the above named debtor, under chapter XIII of the Act of Congress relating to bankruptcy, submitted by him at a meeting of his creditors on the ——— day of ———, 19—, of which meeting ——— days'

notice by mail was given to the said debtor and to his creditors, having been accepted in writing at said meeting by all creditors affected thereby; and

It appearing that said plan and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act; and that the deposit required by the provisions of said chapter has been made; [If it be the fact, add: and that the deposit required by the provisions of said plan, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court;]

It is ordered that the said plan be, and it hereby is, confirmed.

Referee in bankruptcy.

Source of Form.

Official Form No. 61, 305 U. S. 779 (3
F. C. A. [Replacement Volume], p. 346).

Cross-Reference.

In connection with Forms 880, 881, see
Notes to Form 877.

881. Order Confirming a Plan Under Chapter XIII. (Where Less than All Affected Creditors Have Accepted.)

At —, in said district, on the — day of —, 19—.

The application of —, the above named debtor, for confirmation of the plan under chapter XIII of the Act of Congress relating to bankruptcy, submitted by said debtor at a meeting of his creditors on the — day of —, 19—, having been heard and duly considered; and due notice of said hearing having been given [here state the manner of notice]; and [here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had]; and

It appearing that said plan has been duly accepted in accordance with the provisions of said chapter, and that the deposit required by the provisions of said chapter has been made; [If it be the fact, add: and that the deposit required by the provisions of said plan, amounting to the sum of — dollars, has been deposited, subject to the order of the court, in —, of —, the depository designated by the court;] and

It further appearing that the provisions of said chapter have been complied with; that the plan is for the best interests of the creditors of said debtor; that the plan is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by said Act;

It is ordered that the said plan be, and it hereby is, confirmed.

Referee in bankruptcy.

Source of Form.

Official Form No. 62, 305 U. S. 780 (3
F. C. A. [Replacement Volume], p. 346).

882. Debtor's Petition in proceedings Under Section 75 of the Bankruptcy Act.

To the Honorable — —, Judge of the District Court of the United States for the — District of —:

The petition of — —, of —, in the county of —, and district and State of —, respectfully represents:

That he is primarily bona fide personally engaged in producing products of the soil [or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations] as follows: _____;

that such operations occur in the county [or counties] of —, within said judicial district; that he is insolvent [or unable to meet his debts as they mature]; and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

Petitioner.

_____, Attorney.

United States of America, District of —, ss:

I, — —, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Petitioner.

Subscribed and sworn to before me this — day of —, A. D. 19—.

[Official character.]

Source of Form.

Official Form No. 63, 305 U. S. 780 (3 F. C. A. [Replacement Volume], p. 347).

Cross-Reference.

General provisions concerning forms, see notes to Form 805.

Statutory References.

"Farmer" defined, 3 F. C. A., Title 11, § 203 (r); U. S. C. A., Title 11, § 203 (r); id. U. S. C.

Inventory required, 3 F. C. A., Title 11, § 203 (d), (f); U. S. C. A., Title 11, § 203 (d), (f); id. U. S. C.

Jurisdiction and power of the court, 3 F. C. A., Title 11, § 203 (e), (n); U. S. C. A., Title 11, § 203 (e), (n); id. U. S. C.

Operation and effect, 3 F. C. A., Title 11, § 203 (n); U. S. C. A., Title 11, § 203 (n); id. U. S. C.

Petition or answer and schedules, 3 F. C. A., Title 11, § 203 (c); U. S. C. A., Title 11, § 203 (c); id. U. S. C.

General Orders in Bankruptcy.

Requirements of petition, Order No. 50 (2), (9).

NOTES TO DECISIONS**In General.**

Court has jurisdiction though petition was not verified and no commissioner had been appointed. *In re O'Brien* (C. C. A. 2), 78 Fed. (2d) 715, 29 Am. B. (N. S.) 556.

Offer of composition must comply with 3 F. C. A., Title 11, § 203 (a) to (s); U. S. C. A., Title 11, § 203 (a) to (s); id. U. S. C. *In re Borgelt* (C. C. A. 7), 79 Fed. (2d) 929, 30 Am. B. (N. S.) 298, affg. 10 Fed. Supp. 113, 27 Am. B. (N. S.) 538.

That the farmer had no plan to present to his creditors except to offer to go to work personally on the farm with his grown son, and apply presently to his secured debts what he could raise by selling some mercantile property and vacant lots, hoping to pay all in full finally, did not require the dismissal of his proceedings under 3 F. C. A., Title 11, § 203; U. S. C. A., Title 11, § 203; id. U. S. C. *Bartels v. John Hancock Mut. Life Ins. Co.* (C. C. A. 5), 100 Fed. (2d) 813, 38 Am. B. (N. S.) 205. Affd. — U. S. —, 84 L. ed. 154, 60 Sup. Ct. 221, 41 Am. B. (N. S.) 296.

883. Order Approving Debtor's Petition in Proceedings Under Section 75.

At —, in said district, on the — day of —, 19—, before the Honorable —, judge of said court, the petition of —, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

Witness the Honorable —, judge of said court, and the seal thereof, at —, in said district, on the — day of —, 19—.

Clerk.

[SEAL OF THE COURT]

Source of Form.

Official Form No. 64, 305 U. S. 782 (3 F. C. A. [Replacement Volume], p. 347).

Cross-Reference.

In connection with Forms 883 to 887, see notes to Form 882.

General Orders in Bankruptcy.

Approval of petition, Order No. 50 (2), (10).

884. Order of Reference in Proceedings Under Section 75.

Whereas the petition of ———, filed in this court on the ——— day of ———, 19——, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, having been duly approved by order of this court on the ——— day of ———, 19——, it is thereupon ordered, that said matter be referred to ———, one of the conciliation commissioners of this court, to take such further proceedings therein as are required by said section; and that the said ——— shall attend before said conciliation commissioner on the ——— day of ———, at ———, and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this court relating to the proceedings under said section.

Witness the Honorable ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, 19——.

Clerk.

[SEAL OF THE COURT]

Source of Form.

Official Form No. 65, 305 U. S. 782 (3 F. C. A. [Replacement Volume], p. 347).

General Orders in Bankruptcy.

Powers and duties of commissioner, Order No. 50 (11).

Reference of petition, Order No. 50 (2), (10).

885. Bond of Conciliation Commissioner.

Know all men by these presents: That we ———, of ———, as principal, and ———, of ——— and ———, of ———, as sureties, are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 19——.

The condition of this obligation is such that whereas the said ——— has been on the ——— day of ——— A. D. 19——, appointed by the Honorable ———, judge of the District Court of the United States for the ——— District of ———, a conciliation commissioner under section 75 of the Bankruptcy Act, in and for the county of ———, in said district:

Now, therefore, if the said ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of conciliation commissioner, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in
the presence of—

_____[L. s.]
_____[L. s.]
_____[L. s.]

Approved this — day of —.

District judge.

Source of Form.

Official Form No. 66, 305 U. S. 783 (3
F. C. A. [Replacement Volume], pp. 347,
348).

886. Notice of First Meeting of Creditors in Proceedings Under Section 75.

To the creditors of —, of —, in the county of —, and district
aforesaid:

Notice is hereby given that on the — day of —, A. D. 19—, the
petition of the said —, praying that he be afforded an opportunity
to effect a composition or an extension of time to pay his debts under
section 75 of the Bankruptcy Act, was approved by this court as properly
filed under said section; and that the first meeting of his creditors will be
held at — in —, on the — day of —, A. D. 19—, at — o'clock
in the — noon, at which time the said creditors may attend, prove their
claims, examine the debtor, and transact such other business as may
properly come before said meeting.

Conciliation Commissioner.

—, 19—.

Source of Form.

Official Form No. 67, 305 U. S. 783 (3
F. C. A. [Replacement Volume], p. 348).

Statutory Reference.

Notices to creditors, 3 F. C. A., Title
11, § 203 (e); U. S. C. A., Title 11,
§ 203 (e); id. U. S. C.

General Orders in Bankruptcy.

Notices to creditors in accordance with
U. S. C., Title 11, § 94, see Order No.
50 (3).

887. Application for Confirmation of a Composition or Extension Proposal Under Section 75.

To the Honorable —, Judge of the District Court of the United
States for the — District of —:

At —, in said district, on the — day of —, A. D. 19—, now
comes —, the above-named debtor, and respectfully represents to

the court that, after he had filed in court a schedule of his property and a list of his creditors, as required by law, he offered a proposal for a composition or an extension to his creditors, which proposal has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims.

Wherefore the said ——— respectfully asks that the said proposal be confirmed by the court.

Debtor.

Source of Form.

Official Form No. 68, 305 U. S. 784 (3 F. C. A. [Replacement Volume], p. 348).

Statutory References.

Application for confirmation, acceptance by majority of creditors, 3 F. C. A., Title 11, § 203 (g); U. S. C. A., Title 11, § 203 (g); id. U. S. C.

Confirmation, terms, and effect, 3 F. C. A., Title 11, § 203 (i) to (l); U. S. C. A., Title 11, § 203 (i) to (l); id. U. S. C.

Setting aside composition extension, 3 F. C. A., Title 11, § 203 (m); U. S. C. A., Title 11, § 203 (m); id. U. S. C.

Time and place for hearing, 3 F. C. A., Title 11, § 203 (h); U. S. C. A., Title 11, § 203 (h); id. U. S. C.

General Orders in Bankruptcy.

Application for confirmation, objections and hearing thereon, Order No. 50 (4), (5), (6), (7).

Setting aside confirmation, Order No. 50 (8).

888. Order Confirming a Composition or Extension Proposal Under Section 75.

An application for the confirmation of the proposal offered by the debtor under section 75 of the Bankruptcy Act having been filed in court, and it appearing that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; and it also appearing that the proposal includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said proposal be, and it hereby is, confirmed.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, A. D. 19—.

Clerk.

[SEAL OF THE COURT]

Source of Form.

Official Form No. 69, 305 U. S. 784 (3 F. C. A. [Replacement Volume], p. 348).

Cross-Reference.

See notes to Forms 882, 887.

889. Petition for Corporate Reorganization (Under Former Section 77B).

District Court of the United States

_____ District of _____

_____ Division

In the Matter of

_____ Lumber Products Com-
pany, Ltd., a corporation,

Debtor.

No. _____

In proceedings for the reorganiza-
tion of a corporation.

ORIGINAL PETITION OF DEBTOR

To the honorable judges of the District Court of the United States, _____
District of _____, _____ Division:

The petition of _____ Lumber Products Company, Ltd., a corporation,
hereinafter referred to as the "debtor," respectfully shows:

I

That debtor is a corporation organized under and existing by virtue of the laws of the state of _____; that it is not a municipal, railroad, insurance, or banking corporation or a building and loan association, but is a corporation which could become a bankrupt under section four of an Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" approved July 1, 1898, and acts amendatory thereof and supplemental thereto. Said Act of Congress and acts amendatory thereof and supplemental thereto hereinafter are referred to as the Bankruptcy Act.

The Debtor now has, and during the _____ months next preceding the date of filing this petition, and also for a long time prior thereto, has had its principal place of business and assets in the city of _____, county of _____, state of _____; and is therefore within the territorial jurisdiction of the District Court of the United States for the _____ District of _____, _____ Division; and the interest of all parties would best be served by filing this petition in said territorial jurisdiction. Debtor's address is _____ Street, _____, _____. The Debtor has not been adjudicated a bankrupt and no proceeding involving the sequestration of its assets is pending in any court; the Debtor is unable to meet its debts as they mature and desires to effect a plan of reorganization.

II

That the nature of Debtor's business originally was the ownership of timber licenses, sawmills and property and equipment necessary for the operation of a sawmill and a lumber business. That Debtor ceased such

business in 19— and has since acted as a holding company, owning and holding all of the outstanding shares of the capital stock of the following corporations, excepting certain qualifying shares held by directors of said corporations:

1. — Shipbuilding and Drydock Corporation, a corporation organized and existing under the laws of the state of —.
2. — Timber Company, Limited, a corporation, organized and existing under the laws of the Province of Canada.
3. — Lumber & Box Company, a corporation organized and existing under the laws of the state of —.
4. — Wirebound Box Company, a corporation, organized and existing under the laws of the state of —.
5. — Marine Supply Company, a corporation, organized and existing under the laws of the state of —.
6. — Lumber Products Steamship Company, a corporation, organized and existing under the laws of the state of —.

That as to said qualifying shares the beneficial ownership is vested in Debtor.

III

In brief, Debtor's assets, other than the stock of said subsidiary corporations which is hereinafter treated separately, consist of:

- (a) Cash in bank, \$1,187.27.
- (b) Accounts receivable, \$5,199.50 (collectible).
- (c) Accounts receivable, \$2,482,618.19 (intercompany accounts uncollectible).
- (d) Sinking fund account, \$3,070.48.
- (e) Harbor leasehold (68.54 acres) upon which shipbuilding business is operated carried at nominal value on books.

And that the liabilities of Debtor consist of:

- (a) Two million five hundred and sixty-five thousand five hundred dollars (\$2,565,500.00) due and owing on its First Lien and Collateral Trust twenty-year seven and one-half per cent. (7½%) Sinking Fund Gold Bonds, hereinafter referred to as bonds, issued March 8, 1924, for the purpose of financing its lumber business, issued under and secured by mortgage dated March 8, 1924, wherein — National Bank of — is named as trustee.
- (b) Approximately one million two hundred and forty-one thousand five hundred and seventy-one dollars and eighty-eight cents (\$1,241,571.88) interest accrued on said bonds since 1930, the last date upon which interest was paid.
- (c) Accounts payable six thousand seventy-five dollars and ninety-four cents (\$6,075.94) (current).
- (d) Due — Shipbuilding and Drydock Corporation four hundred and ninety-six thousand eight hundred and ninety-nine dollars and seventy-six cents (\$496,889.76).

IV

That the issued and outstanding capital stock of Debtor consists of 57,788 shares of Class A stock and 5,112 shares of Class B stock, both of said classes of stock having a par value of ten dollars (\$10.00) per share.

That the difference between said Class A and Class B shares is that the Class A shares are entitled to a preference of four hundred thousand dollars (\$400,000.00) on liquidation, together with interest thereon from April 1, 1930, until paid, over the Class B shares, which amount shall be paid on account of said Class A shares before any amount shall be paid on account of Class B shares.

V

That — Wirebound Box Company, — Marine Supply Company and — Lumber Products Steamship Company have no tangible assets of any kind; that they have not operated since 1925 or thereabouts; that they represent an annual expense to Debtor and are of no value to the efficient operation of Debtor's business; that it is, therefore, highly desirable that those companies be dissolved; that leave will be asked of this court to dissolve said corporations.

VI

That — Timber Company, Limited, owns — licenses issued by the government of the Province of —, Canada, comprising approximately 12,000 acres of timber land on —'s Island in said —, Canada; that it owns in fee simple lots 1497, 1498, and 444 — District, Province of —, Canada; whereupon are located certain buildings, wharves, and docks. That the — Timber Company, Limited, has been to date a financial failure and a great expense to Debtor; that the present annual expense of carrying the said company's properties is nine thousand dollars (\$9,000.00). That competent appraisers familiar with Canadian timber have reported said properties as having no present market value. That a copy of said appraisal is filed herewith marked "Exhibit A" and made a part hereof that Debtor will ask the court to determine what disposition should be made of the shares of stock of said company and its property.

VII

That — Lumber & Box Company owns certain real estate, buildings, and wharves and docks, comprising the sawmill and box factory units located on Lake — in —, —; that said property has a water frontage of approximately 700 feet; that lumber operations at this plant have resulted in heavy losses; that because of these losses the property was closed down in 1925 and since that time has been almost completely dismantled; that the city of —, which has extended its residential district to within short distances of the property, has zoned the property against a resumption of its former operations; that the sawmill and buildings,

originally erected at great cost are specially constructed and unfit for other purposes; that the water adjacent to the docks is of insufficient depth to permit commercial vessels of average draft to moor thereto for the discharging or loading of cargo; that said docks and piers are in need of extensive repairs, necessitating the expenditure of sums in excess of their worth.

That the property has value only as real estate; that competent appraisers have recently estimated this value at twenty-five thousand dollars (\$25,000.00) to forty thousand dollars (\$40,000.00); that the annual expense of carrying this property is three thousand five hundred dollars (\$3,500.00). That a copy of said appraisal is filed herewith marked "Exhibit B" and made a part hereof; that Debtor will ask the court to determine what disposition should be made of the shares of stock of said company and its property.

VIII

That — Shipbuilding and Drydock Corporation is engaged in the shipbuilding and ship repair work at — Harbor, —, —; that said corporation is hereinafter referred to as the "Shipbuilding Corporation." That said asset constitutes the only asset of real substantial value and earning possibilities owned by Debtor. Said Shipbuilding Corporation occupies a — acre tract of real property owned by the city of — on —'s Island at —, —; that said property is leased to the Debtor and subleased by Debtor to the Shipbuilding Corporation; that said lease by its terms expires April 9, 1952, at which time, under its provisions, all of the wharves, piers, docks, slips, bulkheads, sea-walls, and channels thereupon shall revert to and become the property of lessor; that the work undertaken and completed in said shipyard has been of high quality, of great value to the federal government and to the city; that in general said work has resulted in substantial operating profits to said Shipbuilding Corporation; that Debtor believes that a continuance of the said work will be of value to maritime commerce and in turn to the continued development of — Harbor, the city of —, and the state of —.

That it is the opinion of Debtor that ship owners have and may in the future become more reluctant to intrust valuable vessels to said Shipbuilding Corporation when it is generally known that Debtor is in the financial condition set forth herein; that said ship owners have doubts as to the possibility of the prompt completion of the work undertaken and they may fear that the vessel under construction or repair might become involved in litigation.

That bonding companies, compelled by depression experiences to increase their requirements, are now likewise unwilling to assume the risk of becoming surety for said Shipbuilding Corporation with the bonds of Debtor in default; that without the ability to obtain these bonds the operations are of necessity restricted to small repairs, which, while profitable, can never under any circumstances, in the opinion of Debtor, be expected

to produce sufficient earnings to liquidate Debtor's bonds, or even pay the interest thereupon.

That the — Appraisal Company, of national reputation, was employed to and did make an appraisal on a going concern basis of all of the assets of said Shipbuilding Corporation; that said Appraisal Company under date of October 21, 1936, rendered its report in detail showing said assets to have a going concern value as at said date of four hundred and sixty-five thousand dollars (\$465,000.00); that a copy of said appraisal is filed herewith marked "Exhibit C" and made a part hereof.

X

That the books of Shipbuilding Corporation were audited by — Bros. & — as of December 31, 1937. Said audit showed the company's financial condition on said date to be as follows:

Cash on hand	\$230,129.20
Accounts receivable considered collectible	128,723.43
Inventories and work in process.....	75,560.53
	<hr/>
Making a total of.....	\$434,413.16

That by the terms of the original trust agreement the current assets of said corporation are specifically excluded from the lien of the bonds. That copies of said audits are filed herewith marked "Exhibit D" and "Exhibit E" and made a part hereof.

XI

That said Shipbuilding Corporation is not primarily responsible for the payment of the bonds of Debtor, but the assets of the Shipbuilding Corporation, consisting of its lease, buildings, and equipment, have been pledged and are included in the property covered by the trust indenture, as security for the payment of said bonds.

Over a period of many months Debtor has discussed with representatives of certain holders of its bonds a Plan of Reorganization either by way of a voluntary proceeding or under the provisions of said section 77B. As a result thereof, a Plan of Reorganization dated May 24, 1937 was agreed upon, which is hereinafter referred to as the "Plan," which the Debtor believes is fair and equitable and does not discriminate unjustly in favor of any class of creditors or stockholders of Debtor and is feasible.

That on February 13, 1937, application was made to the commissioner of corporations of the state of — for authority to submit said Plan to its bondholders and stockholders. That a hearing was had on said application on May 5, 6, and 25, 1937, and a finding was made that the Plan presented was fair and a permit was issued dated June 14, 1937, by said commissioner authorizing the solicitation of bondholders for their approval of the said Plan. That a copy of said Plan which includes a copy of said

permit is attached hereto marked "Exhibit F" and made a part hereof; that in accordance with said permit, Debtor has solicited its bondholders and stockholders.

That as of December 31, 1937, eighty and sixty-seven hundredths per cent. (80.67%) of the holders of Debtor's bonds, representing two million sixty-nine thousand five hundred dollars (\$2,069,500.00) of said bonds have authorized the — National Bank of — as depositary to appear in this proceeding on their behalf and consent to said Plan.

That as of December 31, 1937, ninety-eight and thirty-five hundredths per cent. (98.35%) of the holders of Class A shares of Debtor have authorized the — National Bank of — to appear in this proceeding on their behalf and consent to said Plan.

Briefly summarized, said Plan contemplates that a new corporation to be known as — Shipbuilding and Drydock Company, hereinafter referred to as the "New Corporation," be organized and that it acquire all of the assets of — Lumber Products Company, Ltd., and — Shipbuilding and Drydock Corporation, Ltd., excepting the stock of — Timber Company, Ltd., and — Lumber & Box Company, free and clear of liens and incumbrances.

It is proposed that the new corporation shall have an authorized capital of one million dollars (\$1,000,000.00) consisting of one million shares of a par value of one dollar (\$1.00) per share.

The said new corporation shall issue 830,000 of said shares in exchange for all of the assets of said shipbuilding business. It is proposed that 230 of said one dollar (\$1.00) shares be transferred to the bondholders in exchange for each one thousand dollars (\$1,000.00) of bonds. There are two million five hundred sixty-five thousand five hundred dollars (\$2,565,500.00) in principal amount of bonds outstanding which will result in a transfer of 590,065 of the said shares to the bondholders. It is proposed that the balance of said 830,000 shares shall be distributed ratably to the present Class A shareholders. There are 57,788 Class A shares outstanding, which will result in the Class A shareholders receiving approximately 239,935 shares.

It is proposed that the balance of said authorized capital of the new corporation shall be held by the new corporation to be sold for cash for the purpose of providing new operating capital in the event it is required by the company.

It is proposed that the assets of — Timber Company, Ltd., and — Lumber & Box Company shall be liquidated and that the proceeds derived therefrom shall be divided ratably among the Class B shareholders who are the owners of bonds, said stock having been distributed in payment of interest on said bonds in 19—.

Under the Plan it is proposed that the parent company and all subsidiaries shall be liquidated and dissolved.

All of the other creditors of Debtor shall be paid the amount of their claims in full in cash and are thus not affected by the Plan.

XII

Debtor desires to propose and have this court consider said Plan, and further desires this court to determine and fix the time within which said Plan shall be accepted and confirmed, to fix and determine a reasonable time within which claims and interests of creditors may be filed or evidenced and after which no claims or interest may participate in the Plan, excepting on order for cause shown; and the manner in which such claims and interests may be filed or evidenced and allowed, and, for the purpose of said Plan and its acceptance, the division of creditors, and stockholders into classes according to the nature of their respective claims.

XIII

There are approximately 757 separate holders of said bonds and approximately 768 separate stockholders of Debtor. By reason of such facts the preparation of a statement showing what, if any, claims and shares of stock of Debtor have been purchased or transferred by those accepting said Plan after commencement or in contemplation of these proceedings, and the circumstances of such purchases and transfers, would be impracticable, and Debtor desires this court to direct that such a statement be not filed.

Debtor believes that the appointment of a trustee to manage its estate would be impracticable, the only business of Debtor being the holding of the stock of its subsidiary companies. That none of the officers of Debtor are paid a salary and they have indicated a willingness to continue the management under this proceeding without a fee. Therefore, to avoid expense and preserve continuity of management Debtor believes that it should be temporarily continued in possession of its estate until further order of court under the provisions of section 77B of the Bankruptcy Act and such terms and conditions as the court may deem proper and that this will be for the best interests of the creditors and stockholders of Debtor.

That it is impracticable to give notice of a hearing on this petition; that Debtor be temporarily continued in possession of Debtor's estate to other persons interested herein, and Debtor is informed and believes, and therefore alleges that it will be for the best interests of its creditors and stockholders if an order be made determining that no notice of a hearing on said petition is required.

The names of Debtor's officers and the offices held by them respectively, are as follows:

- President and Director
- Vice President and Director
- Director
- Director
- Director
- Director
- Director
- Secretary
- Assistant Secretary

At a meeting of Debtor's board of directors duly held prior to the filing of this petition, a resolution was duly adopted authorizing the signing, verification, and filing of this petition. A true copy of said resolution is attached hereto marked "Exhibit F" and by this reference made a part hereof with the same force and effect as if set forth at length herein. That Debtor is informed and believes and therefore alleges that reasonable and adequate notice of the filing of this petition and the determination of the matters herein prayed for except the leaving of Debtor temporarily in possession of its estate, will be given if Debtor is directed to publish once a week for two consecutive weeks in the — Daily Journal and to mail to all of its known creditors and stockholders the form of notice attached hereto and marked "Exhibit G" and made a part hereof.

Wherefore, Debtor prays that an order be made and entered herein:

1. Approving this petition as properly filed in good faith under section 77B of the Bankruptcy Act.

2. Determining that no notice of this petition to temporarily continue Debtor in possession of Debtor's estate be given and temporarily continuing Debtor in possession of all its property and assets with power to continue operating its business, subject to control of the court, pending the further hearing to determine whether to make permanent the order continuing Debtor in possession and fixing a date and prescribing the notice for such hearing.

3. Fixing the time and place for a hearing on the confirmation of said Plan and prescribing the notice of such hearing to be given.

4. Determining and fixing a reasonable time within which claims and interests may be filed or evidenced and after which no claim or interest may participate in the Plan, excepting on order for cause shown, and the manner in which such claims and interests may be filed or evidenced and allowed and determining for the purposes of said Plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests.

5. Directing that there need not be filed herein a statement showing what, if any, claims and shares of stock of Debtor have been purchased or transferred by those accepting the Plan after the commencement or in contemplation of the proceedings herein and the circumstances of such purchase or transfer.

6. Determining that holders of Debtor's bonds and Debtor's stock are the only creditors and persons whose claims and interests will be affected by the Plan.

7. Authorizing the company to continue the solicitation of those security holders who have not consented to the Plan for their consent and approval of said Plan.

8. Granting an injunction against interferences with the properties, assets, and business of the Debtor.

9. Granting such other and further relief, general and special as may be provided for in said section 77B and other provisions of said Bankruptcy Act to which Debtor may be justly entitled.

Dated: January 26, 1938.

— Lumber Products Company, Ltd.

By _____
President.

— & —

By _____

Note.

Section 77B of the Bankruptcy Act has been superseded by 3 F. C. A., Title 11, §§ 501 to 676; U. S. C. A., Title 11, §§ 501 to 676; id. U. S. C.

Cross-References.

General forms may be used where applicable, 3 F. C. A., Title 11, § 502; U. S. C. A., Title 11, § 502; id. U. S. C., Forms 805-866.

General provisions concerning forms, see notes to Form 805.

Statutory References.

For notes concerning corporate reorganizations under § 77B of the Bankruptcy Act (now superseded), see 3 F. C. A., Title 11, § 207, notes; U. S. C. A., Title 11, § 207, notes.

Amendment of petition, 3 F. C. A., Title 11, § 547; U. S. C. A., Title 11, § 547; id. U. S. C.

Approval of petition, 3 F. C. A., Title 11, §§ 541, 549; U. S. C. A., Title 11, §§ 541, 549; id. U. S. C.

Definitions of terms, 3 F. C. A., Title 11, §§ 506, 507; U. S. C. A., Title 11, §§ 506, 507; id. U. S. C.

Jurisdiction, powers, and duties of the court, 3 F. C. A., Title 11, §§ 511 to 521; U. S. C. A., Title 11, §§ 511 to 521; id. U. S. C.

Management, control, possession, and administration of estate, 3 F. C. A., Title 11, §§ 556 to 591; U. S. C. A., Title 11, § 556 to 591; id. U. S. C.

Notices to creditors and interested persons, 3 F. C. A., Title 11, §§ 520, 561, 571, 579, 607, 622; U. S. C. A., Title 11, §§ 520, 561, 571, 579, 607, 622; id. U. S. C.

Petition in pending proceedings, original petition, petition by creditor, petition by subsidiary corporation, contents of petition, 3 F. C. A., Title 11, §§ 526 to 531; U. S. C. A., Title 11, §§ 526 to 531; id. U. S. C.

Service of process upon debtor, 3 F. C. A., Title 11, § 533; U. S. C. A., Title 11, § 533; id. U. S. C.

Want of "good faith" in filing petition, 3 F. C. A., Title 11, § 546; U. S. C. A., Title 11, § 546; id. U. S. C.

890. Answer and Contravention by a Secured Creditor (Under Former Section 77B).

(Title of District Court and Cause.)

ANSWER TO PETITION AND CONTRAVENTION BY TC, A SECURED CREDITOR

Now comes TC, a secured creditor of the above-named corporation and a person interested in and affected by the above-entitled proceeding, for his answer and for the purpose of intervention herein and for the purpose of controverting the facts alleged in the petition of said corporation, filed herein under section 77B of the Bankruptcy Act of the United States, alleges and denies as follows, to wit:

I

Alleges that he is the owner and in possession of certain bonds, of the par value of thirteen thousand five hundred dollars (\$13,500.00), issued by said corporation, as — Lumber Products Company First Lien and Collateral Trust twenty-year, seven and one-half per cent. (7½%) Sinking Fund Gold Bonds, with the interest coupons attached and that his interest and claim with premium thus represented, amounted on March 1, 1938, to the total sum of twenty-three thousand, one hundred one dollars and eighty-seven cents (\$23,101.87); that the proposed Plan of Reorganization set forth in said petition of said corporation, affects materially and adversely the interests of this bondholder who is a secured and nonassenting creditor of petitioner;

II

Alleges that the above-entitled court is without jurisdiction to grant the relief prayed for in said petition; that said petition does not state facts sufficient to warrant the granting of the relief prayed for therein and that said petitioner is not in a legal or equitable position to claim any of the benefits of the Bankruptcy Act of the United States or under the provisions of section 77B of said Act;

III

Alleges that said petitioner alleges as its only indebtedness the bonded debt represented in part by said bonds referred to in paragraph I of this answer; that the Plan proposed seeks to subject said bonds and the secured lien thereby created, to cancelation and consequent loss of said lien without due process of law; that said proposed Plan would deprive all bondowners of their liens, while said corporation would retain and keep as its own, all properties and assets pledged in the trust deed securing said bond issue; that said bondowners would thereby be deprived of their right under their said contract to retain said lien until the indebtedness secured thereby has been paid, the right to realize upon said security by a judicial sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the properties by bidding at such sale, the right to have the mortgaged properties devoted primarily to the satisfaction of the debt and the right to control the property meanwhile during the period of default, subject only to the discretion of the court and to have the rents and profits during such period, applied to the satisfaction of the debt; that all of these are substantive property rights the deprivation of which would be contrary to law and equity; and would, in addition, violate the due process clause of the United States Constitution, Amendment 5 thereof;

IV

Alleges that said Plan as proposed in said petition is neither fair nor feasible; that said petition shows that said corporation has no creditors it can not pay and that its only indebtedness is that represented by a small number of owners of a small number of undeposited bonds who have always retained possession thereof and are therefore nonassenting creditors; that the shares of capital stock proposed to be issued under said Plan in lieu of said bonds, would have no market value or other value;

V

That this creditor is informed and believes and therefore alleges that the only unpaid, outstanding and undeposited bonds represent a par value of approximately fifty-six thousand dollars (\$56,000.00) and constitute the only indebtedness of said corporation, that more than 97 per cent. (97%) of the total number of issued bonds now belong to said corporation or to the trustee named in the trust deed securing said bonded debt, to whom the owners of said 97 per cent. (97%) have sold, assigned and transferred all of their right, title, and interest in said bonds and that the remaining portion of less than three per cent. (3%) is represented by said par value of approximately fifty-six thousand dollars (\$56,000.00) the owners of which have not deposited their bonds with said corporation, or with said trustee or with any bondholders' protective committee and who have not assented to any past or present proceedings by said corporation or its representatives;

VI

That this secured creditor is informed and believes and therefore alleges that said corporation and/or its bondholders protective committee and the trustee named in the trust indenture securing said bond issue, have purchased and now own approximately two million five hundred nine thousand five hundred dollars (\$2,509,500.00) par value of the two million five hundred sixty-five thousand five hundred dollars (\$2,565,500.00) the sum alleged in said petition "as the principal amount of bonds outstanding";

VII

Answering paragraph XIII on page — of said petition this creditor alleges that said corporation alone knows, and has exclusive knowledge of, who, and how many of said depositing bondholders have purchased the capital stock of said corporation and accepted the same as the consideration for their bonds and/or to induce them to deposit and to assign and sell their bonds to said corporation and its agents; that said petitioner withholds from the court the necessary information to show what bondholders have surrendered their bonds and have assigned their interest

therein to said corporation, or to its trustee, and that said petitioner exclusively, knows and withholds from the court the names of the owners and the amount of their bonds, who have not deposited or assigned their bonds and who alone are the owners of the only secured liens upon the properties pledged in said trust indenture;

VIII

Alleges that said owners of said undeposited bonds have the right under their contract represented by said bonds, to retain the lien until the indebtedness secured thereby is paid, have the right to realize upon said security pledged in the trust deed by a judicial sale, the right to themselves determine when such sale shall be had, subject only to the discretion of the court, have the right to protect their interests in the properties by bidding at such sale, have the right to have the mortgaged properties devoted primarily to the satisfaction of the debt and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt represented by said bonds;

IX

That this creditor is informed and believes and on such information and belief alleges that the — National Bank of —, the trustee named in said trust indenture, acquired by purchase and prior to October, 1935, owned outright between seven hundred thousand dollars (\$700,000.00) and nine hundred thousand dollars (\$900,000.00) of par value of said bonds, that in the year immediately preceding March 20, 1934, a portion of said bonds representing a par value of eighty-seven thousand five hundred dollars (\$87,500.00) were purchased and owned by said corporation, that in the year preceding March, 1935, said corporation had purchased and owned a portion of said bonds representing a par value of one hundred twenty-nine thousand dollars (\$129,000.00) at an average price of six and one-half cents ($6\frac{1}{2}c$) for each one dollar (\$1.00) par value;

X

That this creditor is informed and believes and therefore alleges that said corporation has, without right or authority of law, issued and delivered without consideration to many of said former bondowners who were induced to deposit their bonds with it, several thousands of shares of either its Class A and/or Class B capital stock, to induce them to assign their bonds to said corporation or to said trustee, and to consent to have them canceled and that said former bondowners are estimated in said Plan to be stockholders entitled to distribution to them of capital to be issued under the proposed plan of reorganization;

XI

That this creditor is informed and believes and therefore alleges that said corporation, without right or authority of law, paid many thousands of dollars belonging to said corporation, to one GA and later, during the year 1936, paid to said GA the additional sum of approximately twenty-five thousand dollars (\$25,000.00) or more, to secure his agreement to cancel his contract with said corporation and that on the 16th day of January, 1930, said corporation made and entered into a contract with said GA wherein and whereby it admitted and contemplated certain illegal acts therein specified and pledged and/or assigned to said GA 64,211 shares of its Class B capital stock;

XII

Denies that Debtor is "unable to meet its debts as they mature," as alleged by it on lines 9 & 10, page 2 of its petition herein, and alleges that said Debtor is well able to pay its obligations on its outstanding bonded indebtedness and that the assets pledged in the trust deed, as security for said bonded debt, have a value in excess of its liability thereunder;

XIII

Alleges that within the last four or five years, said corporation effected, or attempted to effect, a reorganization wherein and whereby it sought to limit its liability to stockholders and creditors and then and thereby adopted as its corporate name "— Lumber Products Company, Ltd." and that this bondowner never consented to said reorganization, is not bound thereby and is and at all times has been a nonassenting creditor of said corporation.

XIV

That this creditor is informed and believes and therefore alleges that the sinking fund requirements of said trust indenture have not been met for many years and were not promptly complied with prior to the first default of said corporation on February 1, 1929;

XV

Answering paragraph 2 of page 2 of said petition this creditor denies that said — Lumber Products Company, Ltd., is now, or that it has since the year 1925, acted as a holding company, owning or holding, or that it holds or owns, all or any of the capital stock of the corporations mentioned in said paragraph and alleges that said — Lumber Company, Ltd., is not legally incorporated as such;

XVI

That this creditor is informed and believes and therefore alleges that ever since its incorporation one DM of —, has been a large stockholder of

said corporation and has ever since acted and does now act as a director of said corporation through his agent and employee, HB, who was selected by said corporation to act as a director in the place and stead of said DM and as his agent and factor at all times; that said DM is now and for a great many years last past has been a director of — National Bank of —, the trustee in the trust indenture herein involved; that at all times said DM has been and still is a dominant factor in said bank and in said Debtor corporation; that during the years 1930, 1934, and 1935, said DM, and as this creditor is informed and believes and on such information and belief alleges, other officials of said Debtor corporation, purchased for a reported consideration of two hundred thousand dollars (\$200,000.00) a release and exemption from their stockholders' liability and that 80,023 or more shares of the original capital stock of said corporation, released said DM and other officials from their stockholders' liability; that any such exemptions from stockholders' liability so purchased, was illegal and without authority of law so far as this creditor is concerned and that said stockholders' liability still exists in the event of a deficiency claim which could become due under said trust deed and after judicial sale of the assets pledged in said trust deed and that said claim is a valuable and substantive right still possessed by this creditor; that said substantive right to a deficiency claim against said DM and other officials of said corporation, would be taken away from this creditor, who has never released or assigned the same, by and under the proposed Plan in the above-entitled proceeding.

XVII

That this creditor purchased all of his bonds prior to the year 1930; that during said year and thereafter said Debtor corporation adopted reorganization and other proceedings wherein and whereby it sought to create supplements and additions to, and many changes in, the original trust deed, known herein as "Exhibit E," securing said bond issue; that all of said proceedings and said changes and additions were unilateral, are inequitable and unfair as to this creditor and were made entirely without the consent and without the knowledge of this creditor; that said proceedings and said supplements and additions to said trust deed, known herein as Debtor's "Exhibits F," "G," "H," and "I," and perhaps other alphabetical letters, were not and are not effective as to this creditor or binding upon him and as to him are illegal and without authority of law or equity and can not and do not change the contractual relation created by the original bond and original trust deed existing between said Debtor and this creditor.

Wherefore, answer is made to said petition, the above-entitled court is requested to dismiss said petition for want of jurisdiction, or to deny the same and render judgment herein enforcing the lien of this bondowner and other bondowners, requiring a judicial sale of and subjecting the assets pledged in said trust deed, to the satisfaction of the debt thereby created

and grant such other and further relief as to it may seem proper and agreeable to equity.

Dated March 7, 1938.

TC.

Secured creditor.

Note.

Section 77B of the Bankruptcy Act has been superseded by 3 F. C. A., Title 11, §§ 501 to 676; U. S. C. A., Title 11, §§ 501 to 676; id. U. S. C.

Statutory Reference.

Answer by debtor, creditor, indenture trustee, or stockholder, 3 F. C. A., Title 11, §§ 536, 537, 542 to 544; U. S. C. A., Title 11, §§ 536, 537, 542 to 544; id. U. S. C.

Cross-Reference.

In connection with Forms 890, 891, see notes to Form 889.

891. Order Confirming Plan of Reorganization (Under Former Section 77B).

(Title of District Court and Cause.)

In the above-entitled matter the petition of Debtor for an order continuing Debtor in possession of its property and assets came on for hearing on February 28, 1938, before the Honorable RJ, United States District Judge and was continued for hearing to March 21, 1938. The said hearing and the hearing for the proposal, consideration, and confirmation of the Plan of Reorganization of Debtor came on regularly for hearing on March 21, 1938, before the Honorable RJ, Judge of the court. Said hearings having been duly continued to April 11, 1938, and prior thereto and on or about March 18, 1938, a modification of said Plan of Reorganization having been proposed and filed herein by Debtor and set for hearing by order of court on April 11, 1938 (said Plan of Reorganization and modification thereof being hereinafter referred to as the "Plan") and said matters having come on regularly for hearing on said date and having been continued from time to time pursuant to order of this court, were concluded on April 22, 1938. At said hearings the following appeared:

* * *

Upon consideration of the evidence and testimony presented before the special master and the report and recommendation of the special master and all exhibits and other proof introduced in this cause and all acceptances, petitions, orders, and proceedings herein, and this court having heard the arguments of counsel and the matter having been submitted to the court for decision;

THE COURT FINDS:

(1) That — Lumber Products Company, Ltd., herein called the Debtor, is a corporation organized and existing under the laws of the state of — and that its principal place of business is and has been during the six months preceding January 28, 1938, in the city of —, county of —,

state of —, which is in the territorial jurisdiction of this United States District Court for the — District of —, — Division, hereinafter sometimes referred to as the court and that it has had its principal assets, both in extent and value, within the boundaries of said judicial district six months preceding January 28, 1938.

(2) That Debtor has not been adjudicated a bankrupt and no prior proceedings involving the sequestration of Debtor's assets is pending in any court.

(3) That Debtor's principal assets consist of the ownership of all of the capital stock of — Shipbuilding and Drydock Corporation. That said subsidiary corporation is engaged in the shipbuilding and ship repair work at — Harbor, —, —. That neither the Debtor, nor any of its subsidiaries are utility corporations subject to the jurisdiction of the regulatory commission or commissions or other regulatory authority or authorities created by the laws of the state or states in which any properties of the Debtor or its subsidiaries are operated.

(4) That on or about January 28, 1938, Debtor herein filed its petition for a reorganization under and pursuant to the provisions of section 77B of an Act of Congress approved July 1, 1898, entitled "An Act to establish a Uniform System of Bankruptcy Throughout the United States and Acts Amendatory Thereof and Supplementary Thereto" (said Act being hereinafter referred to as the "Bankruptcy Act" and said section 77B being hereinafter referred to as "Section 77B"). That said petition sets forth, among other things, the requisite jurisdictional facts, the nature of the business of Debtor, a brief description of the assets, liabilities, and financial condition of the Debtor, and that Debtor did not have sufficient funds with which to meet and pay the obligations of Debtor set forth in said petition and affected by the Plan of Reorganization, hereinafter mentioned. That attached to said petition as "Exhibit E" was a Plan of Reorganization proposed by the said Debtor. That on January 28, 1938, an order of the court was entered herein on said petition, approving the said petition as properly filed under Section 77B, continuing the Debtor in possession and control of its properties, pending a hearing on said petition, providing for the time and place of said hearing and the parties to whom and the manner in which notice of hearing should be given, providing for the filing of claims and objections thereto and classifying the creditors of the Debtor whose interest would be affected by said Plan of Reorganization.

(5) That on February 28, 1938, said petition came on for hearing pursuant to said order of January 28, 1938, before this court and the matter was continued to March 21, 1938. The court announced in open court on February 28, 1938, that in view of the heavy congestion of the court's trial calendar, and that questions of fact too numerous, requiring too much time to be considered by the court in sufficient detail were necessary to be heard and determined in order to enable this court to properly and equitably decide all issues which have been or may be raised herein, it would, therefore, appoint RH as special master for the purpose of holding hearings as

required by Section 77B. That the minute order appointing said special master is dated February 28, 1938, requiring all parties interested herein to submit to the said special master any and all answers, pleadings, objections and authorizing, empowering, and directing the special master to hold hearings as required by the act and by order of court and to submit to this court his findings of fact, together with any recommendations which he might see fit to make.

(6) That on or about March 18, 1938, pursuant to order of court, a modification of the Plan of Reorganization was proposed and filed herein by Debtor. That pursuant to order of court a copy of said modification of said Plan, together with a notice of a hearing thereon to be held on April 11, 1938, in the courtroom of the undersigned judge of this court was mailed on March 31, 1938 to the last-known addresses of all known creditors and stockholders of Debtor. That said modification of said Plan does not adversely affect the rights of Debtor's bondholders under said Plan; that none of said bondholders withdrew their consent to said Plan; that Debtor's Class A shareholders are adversely affected by said modification; that by the terms of said notice approved by this court mailed to each of said Class A shareholders it was provided that they could withdraw their consent to said Plan on or before April 11, 1938; that if their consent to said Plan was not withdrawn by said date they would be deemed to have consented to said modification; that none of said Class A shareholders withdrew their consent; that Class A shareholders holding 52,298.14 shares of said Class A stock, representing eighty-two per cent. (82%) of all of said stock issued and outstanding filed with the — National Bank of — their written consent to said modification.

(7) That on or about April 9, 1938, RH, special master, filed his report herein, showing, among other things, that hearings were held before him on March 3, 4, 8, 10, 11, 16, 17, 18, and on April 8, 1938, on the said Plan of Reorganization, upon objections filed thereto and on matters set forth in the order of reference; that the following appearances were made before him:

* * *

That said special master's report is hereby approved by this court and the findings of fact contained therein are hereby adopted as the findings of this court as fully as though set forth herewith at length, except:

* * *

(8) That Debtor is a holding corporation, owning and holding all of the outstanding shares of the capital stock of the following corporations, excepting certain qualifying shares held by directors of said corporation, the equitable ownership of which is actually in the Debtor.

* * *

(9) That — Shipbuilding and Drydock Corporation (hereinafter referred to as the "Shipbuilding Company") is a corporation organized and existing under the laws of the state of —; that its principal place of

business is and has been for more than six months prior to January 28, 1938, in the city of —, county of —, state of —.

(10) That Debtor's principal asset consists of the ownership of all of the capital stock of said Shipbuilding Company; said Shipbuilding Company is engaged in the shipbuilding and ship repair work at — Harbor, —, — and has substantial assets and earning possibilities, its fixed assets are subject to the lien of a trust indenture dated March 8, 1924 (Debtor's "Exhibit E" in evidence, as modified by supplemental indentures Debtor's "Exhibits F," "G," and "H" in evidence) securing the payment of Debtor's bonds upon which there is now owing a great deal more than the value of such assets. Said Shipbuilding Company has only current debts of small amount besides the lien of said bonds; that the current debts are not affected by the Plan but will be paid in the ordinary course of business. It has current assets not subject to the lien of said bonds which have a value of approximately four hundred thousand dollars (\$400,000.00). The value of said Shipbuilding Company's fixed assets is four hundred and thirty thousand dollars (\$430,000.00). The total value of all assets of said subsidiary is eight hundred and thirty thousand dollars (\$830,000.00).

(11) That Debtor's subsidiaries — Wirebound Box Company, — Marine Supply Company, and — Lumber Products Steamship Company, have no tangible assets of any kind. That said companies have not operated since 1925. That they represent an annual expense to Debtor and have no value to the efficient operation of Debtor's business. That it is desirable that these companies be dissolved.

* * *

(14) That the estimated annual expense of maintaining the Debtor corporation and its subsidiaries in existence is twenty-one thousand five hundred dollars (\$21,500.00). That the expenses of maintaining said corporations and their properties have been paid for many years from the earnings of the Shipbuilding Company.

(15) That in brief Debtor's assets, other than the stock of its subsidiary corporations consist of:

- | | |
|--|------------|
| (a) Cash | \$1,187.27 |
| (b) Accounts receivable, collectible | 5,199.50 |
| (c) Sinking fund account | 3,070.80 |
| (d) Leasehold interest in 68.54 acres of water frontage at — Harbor, under lease from the Harbor Department of the city of —, a municipal corporation, carried on the books of the corporation at the value of | 1.00 |

This leasehold has no realizable value for creditors in the event of liquidation.

(16) That Debtor's liabilities consist of principal and interest amounting to some three million eight hundred seven thousand and seventy-one and 88/100 dollars (\$3,807,071.88) upon first lien bonds issued March 8, 1924, secured by a mortgage or trust indenture which covers the fixed assets

of the Shipbuilding Company and the capital stock of the subsidiaries and upon which no interest has been paid since February 1st, 1929.

(17) That at the date of the institution of these proceedings under Section 77B, the Debtor was at all times and since has been unable to meet its debts as they mature.

(18) That Debtor is insolvent both in the equity sense, that is, it is unable to pay its debts in the ordinary course of business as they mature, and in the bankruptcy sense, that is, its assets at a fair valuation thereof based upon appraisal and audit reports introduced in evidence in this proceeding are not sufficient to pay its debts.

(19) That Debtor's issued and outstanding capital stock consists of 57,065.65 shares of Class A and 5112 shares of Class B both of said classes of stock being of no par value. That AS has filed a claim herein to the ownership of 722.35 of shares of Debtor's Class A stock which was heretofore canceled on Debtor's books. This court is reserving jurisdiction to hear and determine said claim and in the event said claim is approved, the outstanding Class A stock of Debtor shall be increased to 57,788 shares. That there is no difference between said two classes of stock except that the Class A shares are entitled to a preference of four hundred thousand dollars (\$400,000.00) on liquidation together with interest thereon from April 1, 1930 until paid, over the Class B shares, which amount shall be paid on account of Class A shares before any amount shall be paid on Class B shares.

* * *

(22) The bonds of Debtor are owned by approximately 757 individuals who are widely scattered and unorganized. It will be beneficial to the bondholders to allow the Class A shareholders to participate in this reorganization so as to provide continuity of management.

* * *

(25) That the principal valuable consideration passing between the bondholders and the stockholders to justify participation of stockholders in the Plan is the virtual abrogation of said agreement deferring foreclosure until 1944.

* * *

(33) Pursuant to order of this court, entered herein on January 28, 1938, Debtor has filed herein such schedules and has submitted herein such other information as is necessary to disclose the conduct of the Debtor's and its subsidiaries' affairs and the fairness of the proposed Plan of Reorganization. That claims and evidences of interest have been filed herein on behalf of all bondholders by the — National Bank of —, as trustee, and on behalf of stockholders by the Debtor as shown on the claims on file herein; that no objections have been filed or made to the allowance of any of said claims.

* * *

(36) That the only creditors and stockholders of Debtor affected by said Plan of Reorganization were and are as follows:

* * *

(40) Notice as required to be given of hearings by the orders duly made and entered herein on January 28, 1938, and March 21, 1938, have been given in compliance with said orders, and all creditors and stockholders of Debtor, all parties to this proceeding and all interested parties herein had due notice and an opportunity to be heard with respect to the confirmation of the Plan, and to make objections to the Plan and its confirmation, and Debtor has moved for the confirmation of the Plan.

THE COURT IS SATISFIED AND FINDS THAT:

(a) All proceedings taken by Debtor and its board of directors in the preparation and submission of said Plan and for its approval and confirmation have been taken in good faith;

(b) The plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders of the Debtor and is feasible;

(c) The Plan complies with the provisions of subdivision (b) of Section 77B, and all other applicable provisions of Section 77B;

(d) The Plan has been accepted as required by the provisions of subdivisions (e), clause (1) of Section 77B and all other applicable provisions of Section 77B;

(e) The provisions of subdivision (e), clause (2) of Section 77B are not applicable for the reason that Debtor is not a utility subject to the jurisdiction of a regulatory commission or commissions or other regulatory authorities of the state of — in which the properties of the Debtor are operated;

(f) All amounts to be paid by the Debtor for services or expenses incident to the reorganization are to be subject to the approval of this court;

(g) The offer of the Plan and its acceptance are in good faith and have not been made or secured by any means or promises forbidden by the Bankruptcy Act;

(h) The new company that will issue securities and acquire property under the Plan will be such as will be authorized by its charter or by applicable state or federal laws, upon the final confirmation of the Plan, to take all action necessary to carry out the Plan.

(i) That Debtor has no executory contract or unexpired lease of real estate which is to be rejected under the Plan.

* * *

(42) That notices of the hearing for the purpose of determining whether Debtor should remain in possession of its property and assets and for a consideration of and confirmation of the Plan were duly given in the manner provided by order of this court, entered on January 28, 1938, and that the Debtor and all creditors and stockholders of the Debtor and all other

interested parties have had full opportunity to be heard on the proposed confirmation of the Plan, to make objections to the Plan and to be heard upon all of the matters specified in the notice of such hearing. That evidence sufficient and satisfactory to this court has been presented with respect to the assets and liabilities of the Debtor and of its subsidiaries and with respect to various matters and factors involved in connection with the formulation of the Plan and with respect to the Plan and all other matters determined or adjudicated by this order.

(43) That this court has exclusive jurisdiction of the Debtor and of its subsidiaries and of the property of the Debtor and of the property of its subsidiaries, wherever located for the purpose of these proceedings under Section 77B and has jurisdiction to make the findings, orders, adjudications, and decrees contained in this order.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

(1) The court makes this order as an interlocutory order confirming the Plan at this time due to and in accordance with the provision contained in subdivision (7) of paragraph (f) of Section 77B of the Bankruptcy Act, which reads as follows "(7) the debtor, and every other corporation, issuing securities or acquiring property under the plan is authorized by its charter or by applicable State or Federal Laws, upon confirmation of the plan, to take all action necessary to carry out the plan, and that, in case the debtor is a utility corporation subject to the jurisdiction of a regulatory commission or commissions or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, all authorizations, approvals, or consents of each such commission or authority required by the laws of such State or States, have been obtained."

The Plan is hereby confirmed subject to the requirement that the Debtor and its board of directors shall and are hereby ordered, in the manner provided by law, to create or cause to be created a new company as provided in the Plan, which new company shall take all steps in the manner provided by law to authorize the issuance of new securities described in the Plan and the new company shall make application to and obtain a permit from the commissioner of corporations of the state of — to issue the new securities under the Plan; that proof satisfactory shall be presented to this court to the effect that said new company has been duly created and is authorized by its charter or by applicable state or federal laws, upon confirmation of the plan, to take all action necessary to carry out the Plan and that said securities have been duly authorized and that said permit has been granted by said commissioner to said new company, all in accordance with the Plan and in the manner provided by law, and thereupon this court will make and enter its order of final confirmation of the Plan.

(2) The provisions of the Plan and this order shall be binding upon the Debtor and stockholders of the Debtor and all creditors of the Debtor,

secured or unsecured, whether or not affected by the Plan, and whether or not their claims have been filed, and if filed, whether or not approved and allowed, including the stockholders and creditors who have not, as well as those who have accepted the Plan.

(3) Until this court shall provide otherwise the Debtor shall continue to have all of the title and shall exercise subject to the control of this court all of the powers vested in such Debtor by statute and by orders of this court previously entered herein. The Debtor shall upon the further order of this court file with this court a "Debtor in Possession Bond" in such penal sum as this court may direct, conditioned upon the faithful performance of its duties herein. The form of said bond to be first submitted to RH, Special Master, for his approval and thereafter to be subject to the approval of this court.

(4) Until further order of this court Debtor shall pay no salaries to its officers; Debtor's subsidiary Shipbuilding Company shall and is hereby authorized and directed to pay to its officers mentioned in paragraph 41 hereof, the salaries therein set forth.

(5) The Debtor shall pay to and/or for the account of the new company all actual expenses in connection with the carrying out of the Plan as follows: Filing fees and other charges of the secretary of state of the state of — and recording fees of the county clerk of the county of — where the articles of incorporation of the new company are to be filed; all printing and other incidental expenses in connection with the creation of the new company and the authorization of the issuance of the new securities, the filing fees, and any other expenses in connection with the obtaining of the necessary permits from the commissioner of corporations of the state of —, and printing of the new securities.

(6) All the claims filed herein are finally allowed, except claims for taxes, which, if allowed, will be paid in full in cash under the Plan, and the claim filed by AS to certain shares of the Class A stock of this corporation, which, if allowed, or disallowed, will not materially and adversely affect the interest of any creditor or stockholder.

(7) All objections to the Plan of Reorganization and objections to the order of this court classifying creditors and stockholders of the Debtor into classes according to the nature of their respective claims and interests, and objections to the jurisdiction of this court filed by TC and other objecting bondholders and their exceptions to the special master's report, are hereby overruled.

(8) The court specifically reserves jurisdiction:

(a) To make further orders in connection with and to supervise and control the putting into effect and the carrying out of the Plan and final confirmation thereof, including the giving of such directions, authorization, or approval as the court may determine in regard to the new company; the making or joining in by the proper parties of an instrument or instruments of transfer and conveyance; the incorporation of the new company referred to in the Plan, the authorization, creation, and issuance of the new securi-

ties described in the Plan and the delivery of said new securities in exchange and payment for the proper assets of the Debtor in accordance with the Plan and the delivery of the new securities called for by the Plan to the creditors of the Debtor; to consider and pass upon the form, execution, and delivery and sufficiency of all documents to be executed in connection with the consummation of the Plan, and taking of all other proceedings or action and the giving of all directions to the Debtor, the new company and all other interested parties or persons which may be necessary or proper in order to consummate the Plan and effectuate its substance and intent.

(b) To fix and direct the payment of administrative expenses and allowances and to allow reasonable compensation for the services rendered and reimburse for the actual and necessary expenses incurred under or in connection with these proceedings and in connection with the Plan by officers, parties in interest, trustees, depositaries, and the attorneys or agents of any of the foregoing or of the creditors and of the Debtor.

(c) To make such provision as may be equitable by way of injunction or otherwise, to discharge the Debtor from its debts and liabilities and to end all rights and interests of stockholders, creditors, or claimants, except as provided in the Plan or as may consistently with the provisions of the Plan be reserved under the order or orders directing the transfer and conveyance of the estate, property and assets of the Debtor to the new company.

(d) To determine and pass upon the claims filed by AS and all tax claims now on file or which may hereafter be filed hereunder.

(e) To enter a final decree closing the case.

(f) Generally to determine any and all matters pertaining to this order or to the plan not determined heretofore or by this order.

(9) The court hereby directs that the Debtor report to this court in the courtroom of the Honorable RJ, United States District Judge in the ——— Building at the corner of ——— and ——— Streets, ———, California, on May 31, 1938, at ——— —. M. of said day, or as soon thereafter as counsel may be heard, its compliance with this order, at which time this court will pass upon such matters in this proceeding as may be presented to it or as to which the court has reserved jurisdiction by this or any prior order herein.

Service of a copy of this order on or before May 18, 1938, upon the attorneys for all parties who have appeared in this proceeding and publication of a notice thereof in substantially the form attached hereto, in the ——— Daily Journal on the 18th day of May, 1938, is hereby ordered and determined to be reasonable and sufficient notice of said hearing to be held on May 31, 1938, except by announcement at said hearing, unless the court shall otherwise direct.

Date——.

United States district judge.

Note.

Section 77B above referred to has been superseded by the Chandler Act. For

provisions of the Chandler Act which correspond to the quoted portion of 77B, see

3 F. C. A., Title 11, § 624; U. S. C. A., Title 11, § 624; id. U. S. C.

Statutory References.

Adjudication upon failure of reorganization plan, 3 F. C. A., Title 11, §§ 636 to 638; U. S. C. A., Title 11, §§ 636 to 638; id. U. S. C.

Approval or rejection of plan by governmental authorities and creditors, 3 F. C. A., Title 11, §§ 572 to 580; U. S. C. A., Title 11, §§ 572 to 580; id. U. S. C.

Confirmation of plan, 3 F. C. A., Title 11, §§ 621 to 628; U. S. C. A., Title 11, §§ 621 to 628; id. U. S. C.

Modifying or setting aside corporate plan of reorganization, 3 F. C. A., Title 11, §§ 622, 623; U. S. C. A., Title 11, §§ 622, 623; id. U. S. C.

Provisions of plan, required and permitted provisions, 3 F. C. A., Title 11, § 616; U. S. C. A., Title 11, § 616; id. U. S. C.

892. Voluntary Petition for Corporate Reorganization under Chapter X.

In the District Court of the United States
for the _____ District of _____

In the Matter of ——— Brewing Com-
pany, a corporation,
Debtor.

In proceedings for the reorganiza-
tion of a corporation under
Chapter X of the Bankruptcy
Act.

No. ———

DEBTOR'S PETITION FOR CORPORATE REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT OF 1898, AS AMENDED

To the Honorable ———, Judge of the District Court of the United States
for the ——— District of ———:

Now comes ——— Brewing Company, a corporation organized and existing under and by virtue of the laws of the state of ———, and having its principal office and place of business at ———, in the county of ———, in the state of ———, and within the ——— District of ——— (hereinafter called the "debtor"), and files its petition under chapter X of an act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and acts amendatory thereof and supplemental thereto (hereinafter called the "Bankruptcy Act"), and respectfully states:

1. That the debtor is unable to pay its debts as they mature.
2. That the debtor is and for more than six months last preceding the filing of this petition has been continuously a corporation organized and existing under the laws of the state of ——— and having its principal place of business and office at ———, in the county of ——— in the state of ———, and within the ——— District of ———, and is subject to the provisions of chapter X of the Bankruptcy Act, and it files this petition for corporate reorganization to be effected under and pursuant to the provisions of said chapter X of the Bankruptcy Act.
3. That the debtor has not filed in this or any other court a petition or answer under chapter X of the Bankruptcy Act or under any other chapter

or section thereof, and no other petition by or against debtor is pending under said chapter X, and that this court is one in which said debtor may under the provisions of said chapter X of the Bankruptcy Act file this petition.

4. That the nature of the business of the debtor is that of brewing, manufacturing, and selling, at wholesale and retail, — and other similar products for profit; that said debtor is a business or commercial corporation and is not a municipal, railroad, insurance, or banking corporation, or a building and loan association, and is and has been engaged in no other business except that specifically enumerated in this paragraph.

5. That the authorized capital stock of the debtor consists of — shares of common stock of the par value of — dollars (\$—) each, of which authorized capital stock — shares of the par value of — dollars (\$—) each have been issued and are now outstanding, making the aggregate par value of the issued and outstanding capital stock of the debtor — dollars (\$—).

6. That the debtor is in need of reorganization for the preservation of its assets and business as a going concern for the benefit of the creditors and stockholders of the debtor.

7. That attached hereto, marked "Exhibit A," and incorporated herein by reference the same as if fully set forth herein, is a balance sheet of the debtor as of — —, 19—, which balance sheet the debtor had prepared by its employees and believes to be correct as of — —, 19—; that there are some changes in said balance sheet as of this date by reason of operations of debtor since — —, 19—, but that said changes do not materially affect said balance sheet; that real and personal property taxes are due, delinquent, and unpaid, amounting to approximately — dollars (\$—); that there has accrued, and is now due and payable and unpaid, a note for — dollars (\$—) representing a portion of the commission or fee agreed to be paid for renewal of the first mortgage note shown on said balance sheet marked "Exhibit A"; that there are current accounts outstanding and unpaid amounting to approximately — dollars (\$—); that on — —, 19— there will become due and payable, interest on account of moneys advanced by certain officers, directors, and others, said advance having been in the amount of — dollars (\$—); that on — —, 19— there will also become due and payable a note with an unpaid balance of approximately — dollars (\$—); that on — —, 19— there will become due and payable interest on account of the second mortgage bonds of debtor presently outstanding in the amount of — dollars (\$—); that there is not sufficient cash on hand to pay said sums now due and payable, and there is no likelihood of sufficient cash being on hand to meet the interest payments due on — — and — —, 19— and the note due on — —, 19—, and the debtor is unable to pay same although the assets of the debtor as shown by said balance sheet marked "Exhibit A" are far in excess of its liabilities; that the current assets alone of debtor are in excess of — dollars (\$—) and include more than — barrels

of — now finished and in process; that demands for payment of current and past due accounts are being made by creditors and suits threatened thereon, and that unless a reorganization of the debtor is effected, the assets of the debtor will be seized on executions that will likely ensue if such suits are brought and ripen into judgment, or the assets of debtor will be foreclosed under the first mortgage or under the second mortgage, or bankruptcy proceedings will be filed against the debtor.

8. That the specific facts showing the need for relief under chapter X of the Bankruptcy Act are set forth in the preceding paragraph, and unless relief can be had in this proceeding, there will be a forced sale of debtor's property and assets, either by foreclosure, execution, bankruptcy, or otherwise, which under the present circumstances would result in a great sacrifice and cause unnecessary and excessive losses to creditors and stockholders, and in order to prevent the same, it is necessary that a reorganization of debtor be effected under chapter X of the Bankruptcy Act for the following reasons, to wit:

(a) That upon a forced sale in the event of foreclosure, execution, or bankruptcy, in all likelihood, and as the debtor believes, it will be impossible to obtain a purchaser with sufficient means who would be ready, willing, and able to purchase a substantial part or all of the assets of debtor at any fair or reasonable figure.

(b) That the value of the assets and property of the debtor is greatly enhanced by virtue of their nature and character as an integral part of a going business, and if sold separately, or if sold after the operations of debtor have been discontinued, the value of the assets and property of debtor as a going business and its good will will be virtually destroyed, and there would be a tremendous unnecessary loss to both creditors and stockholders that can be obviated by a reorganization in this proceeding.

(c) That the fixed charges of the debtor may be substantially reduced.

9. That there are no other pending proceedings affecting the property of the debtor known to it.

10. That on — —, 19— there was submitted to a special meeting of the stockholders of debtor, called for the purpose, a proposed amendment to the articles of incorporation of debtor, the effect of which if adopted would have been to change the authorized capital stock of debtor from — shares of common stock with a par value of — dollars (\$—) per share to — shares of common stock with a par value of — dollars (\$—) per share, it being provided that each share of presently issued and outstanding common stock with a par value of — dollars (\$—) per share should be exchanged for one share of common stock with a par value of — dollar (\$—) per share; but at said meeting of stockholders there were not present in person or by usable proxies holders of sufficient stock to constitute a quorum for the consideration of said amendment, and on unanimous order of the stockholders present at said meeting same was adjourned to — —, 19—; that the Securities and Exchange Commission, Washington, D. C., under and by virtue of authority vested in it under the

Securities Exchange Act of 1934, as amended, and in accordance with its Regulation X-14, has required that the debtor, if it desires to solicit proxies from the stockholders to be voted in favor of said proposed amendment, mail or deliver to all said stockholders a supplemental proxy statement which shall include a recent balance sheet of the debtor and an operating statement covering the result of operations from — —, 19— to a recent date; that it would not be to the best interest of the debtor and its creditors and stockholders that such information be published at this time, and such publication would have an adverse effect on the business of debtor, and accordingly the board of directors of debtor determined that such solicitation of proxies should not be made; that there is no other plan of reorganization, readjustment, or liquidation affecting the property of the debtor pending, either in connection with or without any judicial proceeding.

11. That the debtor is now virtually without working capital; that a plan of reorganization must make special provision for the holders of the first and second mortgages on the property and assets of debtor; that there is need of adjusting existing secured obligations, and that by reason thereof, adequate relief can not be obtained under chapter XI of the Bankruptcy Act.

12. That the debtor believes that a feasible, fair, and equitable plan of reorganization satisfactory to all interested parties, including creditors and stockholders, can be worked out under the direction of this court in this proceeding, and that the debtor desires that such a plan be effected under the provisions of chapter X of the Bankruptcy Act.

13. That the filing of this petition has been duly authorized by the debtor by resolution of its board of directors adopted at a meeting thereof duly held on the — day of —, 19—, and that a true and correct copy of said resolution adopted by said board of directors and concurred in unanimously by all of the members of said board of directors present at said meeting (five out of seven directors being present thereat) is as follows: [Here insert].

Wherefore, your petitioner, debtor, prays:

1. That this Honorable Court make and enter its order approving this petition as having been filed in good faith and in compliance with the requirements and provisions of chapter X of the Bankruptcy Act.

2. That this Honorable Court adjudge that the debtor is unable to pay its debts as they mature.

3. That this Honorable Court, pending the further order of this court in the premises, appoint one or more trustees as provided by chapter X of the Bankruptcy Act, and that said trustee or trustees, when appointed and qualified as the court may order, shall be directed to operate and manage the business of the debtor and to continue the operation thereof as a going concern, and that said trustee or trustees shall have all of the title of and shall exercise, consistent with the provisions of chapter X of the Bankruptcy Act, all of the powers of a trustee appointed thereunder and also all of the powers of a trustee appointed pursuant to section 44 of the Bank-

ruptcy Act, and also the same powers as those exercised by a receiver in equity to the extent consistent with chapter X of the Bankruptcy Act.

4. That the court order that a hearing in this matter be held at a time to be fixed by the court not less than thirty days and not more than sixty days after the approval of this petition, and that the said order require the trustee or trustees to be appointed hereunder to give at least thirty days' notice to the creditors, stockholders, mortgage trustees, the Securities and Exchange Commission, and such other persons as the court may designate, such notice of hearing to be given by mail and by publication in such newspaper or newspapers of general circulation or in such manner and for such time as the court may designate, and that the court fix the terms, provisions, and conditions of said notice.

5. That the court enter an order that all persons, firms, and corporations, pending the further order of the court, be restrained from instituting, prosecuting, or continuing the prosecution of any actions, suits, or proceedings at law or in equity, or to enforce any lien or claim upon the estate or property of the debtor; from levying or serving any garnishments, attachments, executions, or other process upon or against the debtor or any of its property; and from doing any act in any way interfering with the property or business of the debtor or the possession or operation thereof by the trustee or trustees to be appointed by this court.

6. That such further proceedings be had herein as may be proper and in conformity with and as provided by chapter X of the Bankruptcy Act.

7. That the court grant the debtor such other and further relief as to the court may seem just and proper.

By _____
President.

Attorney for debtor.

STATE OF _____, }
COUNTY OF _____. } ss.

_____, of legal age, being first duly sworn, upon his oath states that he is, and since _____, 19— has been, the president of _____ Brewing Company, a corporation, the petitioning debtor described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and is familiar with the matters and things stated therein; that all of said matters and things are true of his own knowledge except as to matters stated on information and belief, and as to such matters, he believes the same to be true.

Affiant further states that this petition is filed in good faith and by authority and at the direction of the board of directors of _____ Brewing Company, a corporation.

Subscribed and sworn to before me this — day of —, 19—.
My commission expires — —, 19—.

Notary Public.

893. Order Approving Filing of Voluntary Petition under Chapter X.

In the District Court of the United States
for the — District of —

In the Matter of — Brewing Com- pany, a corporation, Debtor.	}	In proceedings for the reorganiza- tion of a corporation under chapter X of the Bankruptcy Act. No. —
--	---	---

ORDER APPROVING FILING OF PETITION OF DEBTOR TO REORGANIZE, APPOINT-
ING TRUSTEES AND PROVIDING FOR THEIR QUALIFICATION, AUTHORIZING
TRUSTEES TO CONTINUE TO OPERATE THE BUSINESS OF THE DEBTOR, EN-
JOINING PROCEEDINGS AGAINST AND INTERFERRING WITH DEBTOR OR THE
TRUSTEES AS TO THE PROPERTY OF THE DEBTOR, SETTING TIME FOR HEAR-
ING, DIRECTING TRUSTEES TO GIVE NOTICE THEREOF, ETC.

On this the — day of —, 19—, this cause came on to be heard on the
verified petition of — Brewing Company, a corporation, debtor (herein-
after referred to as the "debtor"), and the court being fully advised in the
premises, and being satisfied that said petition complies with the require-
ments of chapter X of the Bankruptcy Act of the United States of America,
and that said petition has been filed in good faith, it is ordered, adjudged,
and decreed:

1. That the said petition be and it hereby is approved as properly filed
in good faith in compliance with the requirements of chapter X of the
Bankruptcy Act of the United States of America.

2. That the debtor is unable to pay its debts as they mature.

3. That by reason of the facts set forth in said petition, the debtor
requires and is entitled to relief under chapter X of the Bankruptcy Act
and has no adequate remedy except through the granting of such relief,
and that adequate relief can not be obtained under chapter XI of the
Bankruptcy Act.

4. That —, of the county of — in the state of —, whom the court
finds to be a disinterested person as defined by chapter X of the Bank-
ruptcy Act, be and is hereby appointed trustee and —, a director and
president of debtor, be and he hereby is appointed an additional trustee
of said debtor and of all of its property and assets wherever located as
provided by chapter X of said Bankruptcy Act.

That such trustees shall separately execute bonds in the penal sum of
— dollars (\$—) conditioned upon the faithful performance by each

trustee of his duties as trustee under chapter X of the Bankruptcy Act; such bonds to be with sureties to be approved by this court. And that upon the filing and approving of such bonds, the debtor shall forthwith turn over and deliver to said trustees all of the property and assets of every kind and description of the debtor, including all books, papers, and records in the possession of the debtor; and thereafter all of such assets and property of the debtor, and the title thereto, shall vest in the said trustees, consistent with the provisions of chapter X of the Bankruptcy Act of the United States of America; and the said trustees shall thereafter possess, operate, and manage the same, and shall operate and manage the business of the debtor, consistent with the provisions of chapter X of the Bankruptcy Act, and shall have all of the powers of a trustee under said chapter X, as well as all of the powers of a trustee appointed pursuant to section 44 of said Bankruptcy Act, and also the same powers as those exercised by a receiver in equity, to the extent consistent with chapter X of the Bankruptcy Act. The premium on each of said bonds shall be paid by the trustees out of the assets of the debtor.

5. That the said trustees be and they are hereby authorized and directed, pending the further order of this court, to manage, maintain, operate, and keep in proper condition and repair the assets and property of the debtor, whether in this — District of — or elsewhere, and to manage, operate, and conduct the business of the debtor as a going concern, both within and without the — District of —; and to this end to exercise their authority and franchises and discharge all duties obligatory upon them, and to employ and fix the compensation, subject to the supervision of this court, of all officers, attorneys, managers, agents, and employees, and to collect and receive the income, rents, and revenues of said assets, properties, and business, to collect all outstanding accounts, to continue, until further order of this court, the existing purchasing, selling, operating business and financial arrangements and relations of the debtor to the extent that they shall deem advisable and conducive to the proper continuation of the business of the debtor; all according to law and subject to the supervision and control of this court.

6. That the said trustees are authorized from time to time, until the further order of this court, out of funds coming into their possession as trustees, as aforesaid, to pay all necessary current expenses in operating, managing, and preserving the assets and properties aforesaid, and conducting the business aforesaid, including specifically, without limiting the generality of the foregoing, wages, salary, and compensation of accountants, managers, agents, and employees of the trustees, as well as rents, such ordinary capital expenditures as may be necessary for the proper conduct of the business and the costs and expenses of this proceeding, including expenses of preparing and printing and mailing all necessary pleadings, petitions, orders, plans, and other papers now filed or to be filed herein, and to hold any additional moneys that may come into posses-

sion of the trustees and be not expended for any of the aforesaid purposes; all subject to the further order of this court.

The said trustees shall not borrow money for any of the purposes aforesaid, or for any other purpose, without the express prior approval of this court.

7. That the trustees be authorized to operate and maintain a bank account or bank accounts as such trustees, and to draw any and all checks on such bank account or bank accounts in the ordinary conduct of the business as trustees, as herein ordered by this court, and, subject to the direction and approval of the court, to exercise such authority and control over such bank account or bank accounts as may have been heretofore granted, or as may be hereafter granted to said trustees by this court.

8. That pending further order of the court, the trustees are empowered to institute and prosecute, in any court or before any department, commission, or tribunal of competent jurisdiction, such suits and proceedings as may be necessary in their judgment for the recovery or proper protection of the properties or rights of the trustees or of the debtor; and, subject to the approval of the court, to make settlement of any of the same; and, likewise, to defend any actions, claims, proceedings or suits now pending against the debtor, or that may hereafter be asserted or brought in any court or before any commission, department, or tribunal, and all appeals therefrom, to which the debtor is or shall be a party, or to which the trustees are or shall be a party; but no payment shall be made by the trustees in respect of any such claims, actions or proceedings, and no action shall be taken by the trustees in defense or settlement of any such claims, actions, or proceedings, which shall have the effect of establishing any claim upon or right in the properties or funds in the possession of the trustees that otherwise would not exist.

9. That all persons, firms, and corporations are hereby enjoined, until the further order of this court, from instituting, prosecuting, or continuing the prosecution of any suits or proceedings at law or in equity against the debtor or against the trustees, or under any statute against the debtor or the trustees, or to enforce any lien or claim upon the estate or property of the debtor, and from levying or serving any garnishments, attachments, executions, or other process upon or against the debtor or the trustees, or upon or against any of the property of the debtor in the possession of the trustees; and from doing any act in any way interfering with the assets, property, or business of the debtor, or the property in the possession of the trustees, until after the entry of the final decree herein; and all sheriffs, constables, and other officers, and their advisors, representatives, agents, servants, and attorneys are hereby enjoined from seizing, selling, removing, transferring, disposing of or attempting in any way to seize, sell, remove, transfer, or dispose of, or in any way to interfere with any properties, assets, or effects in the possession of the trustees, and from doing any act whatsoever, of any kind, nature, or description whatsoever, to interfere with the possession and management by the trustees of the assets,

property, and business of the debtor coming into the possession and control of the trustees, as aforesaid.

10. That the said trustees shall as soon as convenient, and in any case not later than the time hereinafter in this order and decree provided for the hearing, prepare and file in this court, the same to be prepared at the expense of the estate, and the same to be verified by the oath of the trustees:

(a) A schedule of the property of the debtor coming into the hands of the trustees, showing the location, quantity, and money value thereof.

(b) A schedule of the creditors of the debtor of each class, showing the amounts and character of their claims and securities, and so far as known the name and post-office address or place of business of each creditor; and

(c) A schedule of the stockholders of the debtor of each class, showing the number and kind of shares registered in the name of such stockholder and the last known post-office address or place of business of each stockholder.

11. That the trustees shall forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matters relevant to this proceeding or to the formulation of a plan of reorganization, and shall report thereon to the judge of this court. The trustees furthermore may, if they so determine, examine the directors and officers of the debtor, and any other witnesses concerning the matters set forth in this paragraph. They shall report to the judge of this court any facts ascertained by them pertaining to fraud, misconduct, mismanagement, and irregularities, and to any causes of action available to the estate. They shall, at the earliest date practicable, prepare and submit a brief statement of their investigation of the property, liability, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof; and they shall consider the formulation of a plan for the reorganization of the debtor, and may at any time hereafter give notice to the creditors and stockholders that they may submit to the trustees suggestions for the formulation of a plan of reorganization, or proposals in the form of plans, within a time to be named in the notice given by the trustees thereof.

12. That there shall be a hearing held before this court, in the federal courtroom, Federal Building, in the city of —, —, on —, —, 19—, at — — M., Central Standard Time, at which time this court will hear any objections to the retention in office of the trustees herein named, or either of them, on the ground that said trustees, or either of them, are not qualified or are not disinterested, or for any other reason, as provided by said chapter X of the Bankruptcy Act. And the trustees shall notify the Securities Exchange Commission and all of the creditors, mortgage trustees, and stockholders of the debtor of such hearing by United States mail, postage prepaid, on or before — —, 19—; notices to be mailed to said Securities Exchange Commission and to each creditor, mortgage trus-

tee, and stockholder of the debtor appearing as such upon the books or records of the debtor, addressed to such creditor, mortgage trustee, and stockholder at his address as it appears upon said books or records, and by publication of a similar notice on or before the said last-mentioned date in the — Journal, a newspaper of general circulation, published at —, in the county of —, and state of —, the said notice so mailed and published to be in substantially the following form:

“NOTICE

In the District Court of the United States
for the — District of —

In the Matter of — Brewing Co., }
a corporation. } No. —

To all parties concerned:

The petition of — Brewing Co., a corporation (hereinafter called the “debtor”) for reorganization and for relief under chapter X of the Bankruptcy Act of the United States of America, has been approved as properly filed in good faith and in compliance with the provisions of chapter X of the Bankruptcy Act of the United States of America; and an order and decree was entered by said court in the above-entitled cause on — —, 19—, appointing the undersigned as trustees under and by virtue of the provisions of said chapter X of the Bankruptcy Act aforesaid, and authorizing the said trustees to operate the business of the debtor and to perform the duties of trustees under said chapter X of said Act, until the further order of the court.

Notice is hereby given, pursuant to the aforesaid order and decree, of a hearing to be held before the District Court of the United States for the — District of —, in the federal court room, Federal Building, in the city of —, —, on — —, 19—, at — —. M., Central Standard Time, at which time the court will hear any objections to the retention in office of the trustees herein named, or either of them, on the ground that said trustees, or either of them, are not qualified or are not disinterested, or for any other reason, as provided by said chapter X of the Bankruptcy Act.

At or before the hearing aforesaid, any creditor or stockholder of the debtor, or any number of the same, may submit to the trustees suggestions for the formulation of a plan of reorganization of the debtor, or proposals in the form of plans.

All persons interested will take due notice thereof and govern themselves accordingly.

Dated at —, —, — —, 19—.

Trustees appointed by the court in said proceeding.”

13. That this court reserves full right and jurisdiction to make from time to time such orders as this court may deem proper in executing the powers conferred by chapter X of the Bankruptcy Act; and this court reserves full right and jurisdiction to make from time to time such orders amplifying, extending, remedying, or otherwise modifying this order, and any and all other orders now or hereafter made herein, as to this court may at any time seem proper. And the trustees herein are hereby authorized and directed to ask the leave of this court for any further orders, decrees, and directions which in their opinion may seem fit and proper.

United States district judge.

894. Involuntary Petition for Corporate Reorganization under Chapter X.

In the District Court of the United States

for the District of _____

In the Matter of — Gas and Water Company,	} In proceedings for reorganization of a corporation.
Debtor. } No. —	

PETITION

To the Honorable, the judges of the District Court of the United States for the District of —:

The petition of FL, ST, and BO respectfully shows:

1. FL is a resident of —, state of —, and ST and BO are residents of —, state of —. Petitioners hold noncontingent and liquidated claims against both — Gas and Water Company (hereinafter called the "debtor") and its property amounting in the aggregate to more than the sum of — dollars (\$—). Petitioners acquired in —, 19—, and severally own and possess, — Bonds of the debtor as follows: [Here insert].

2. The debtor is a corporation duly organized and existing under the laws of the state of —. The debtor has had its principal place of business for a period in excess of six months next preceding the filing of this petition at — Street, —, —. The debtor is not a municipal, railroad, insurance or banking corporation or a building and loan association. No other petition for the reorganization of the debtor under chapter X of the Bankruptcy Act, as amended (hereinafter referred to as "chapter X") is pending.

3. The debtor is insolvent and unable to meet its debts as they mature.

4. The principal business of the debtor is that of a — company for the securities of operating subsidiary companies. As an incident to its main business, the debtor is also engaged directly in the —, —, and

— of — in the state of —. The debtor owns one hundred per cent. (100%) of the outstanding shares of stock of the following operating subsidiary companies: [Here insert].

— Gas Company produces and sells natural gas in the state of — and in the state of —. The Water Companies sell water at retail in certain communities in the state of —, including —, —, and —. The — Ice Company furnishes ice and refrigeration service in —, state of —.

5. The assets, liabilities, capital stock and financial condition of the debtor are as follows:

The principal assets of the debtor consist of shares of stock and other securities of the operating subsidiary companies referred to above. The consolidated balance sheet of the debtor as of — —, 19—, a copy of which designated "Exhibit A" is annexed hereto and made a part hereof, shows total assets of — dollars (\$—) as compared with total liabilities of — dollars (\$—), including capital liabilities in the amount of — dollars (\$—). The long-term debt of the debtor shown on the debtor's balance sheet as of — —, 19— is as follows: [Here insert].

Petitioners believe and therefore aver that the fair value of the assets of the debtor is substantially less than shown in said consolidated balance sheet and that such assets at a fair valuation are not sufficient in amount to pay its debts.

The debtor has reported substantial operating deficits since its organization effective —, 19— to — —, 19—, except for the year — when it reported net profits of — dollars (\$—), the reported earnings of the debtor for said period having been as follows: [Here insert].

For the twelve months ending — —, 19— the operating deficit of the debtor equaled — dollars (\$—) after allowance for interest charges on funded debt.

The debtor has defaulted in the payment of the following fixed charges due — —, 19—: [Here insert].

The — Gas Company, the largest subsidiary of the debtor, has defaulted in the payment of its — per cent. (—%) notes due — —, 19—, in the principal amount of — dollars (\$—).

In addition to the failure of the debtor to pay the large amount of overdue and unpaid interest on its bonded debt, it will be noted that the debtor is in default in respect of substantial sinking fund obligations, which defaults are still subsisting. The annual deficits referred to above have not only reduced working capital but have impaired the debtor's credit, and the basic problems of the debtor can be solved only by a reorganization.

6. There are no pending proceedings known to petitioners affecting the property of the debtor.

7. A voluntary plan of reorganization has been prepared by the debtor and the indentures of trust provided for in the plan have been filed with the Securities and Exchange Commission under the Indentures of Trust Act of 1939. Petitioners are advised that under the proposed voluntary

reorganization of the debtor the holders of First Lien Sinking Fund — Bonds will be required to waive existing defaults in respect of its sinking-fund obligations and the holders of General Lien — Bonds will be required to waive the default in respect of interest due — —, 19— and to exchange their bonds for new general lien income bonds providing for the payment of interest in any year only if earned. Petitioners believe that under the proposed plan there are no adequate compensating benefits or advantages offered to secured creditors. Petitioners further believe and aver that under the plan as proposed the stockholders of the debtor will retain their interests although the assets of the debtor at a fair valuation are insufficient to justify the retention by the stockholders of any interests in the reorganized debtor.

8. The need for relief under chapter X is shown by the facts set forth herein in respect of the financial condition of the debtor, as well as the proposal by the debtor to effect a voluntary reorganization without the safeguards of chapter X. The debtor has neither the funds, nor the ability to borrow the funds, necessary to meet its obligations now due and payable. The greater part of securities owned by the debtor is pledged with the — Bank of the city of —, as trustee under an Indenture of Trust dated — —, 19— to secure the issue of First Lien Sinking Fund — Bonds. These securities are also held, subject to the prior lien of the First Lien Sinking Fund — Bonds, as security for the issue of General Lien — Bonds of the debtor issued pursuant to Indenture of Trust dated — —, 19— under which — Trust Company, —, —, is designated a trustee. Unless a reorganization is effected, the trustees under the Indentures of Trust above referred to, may foreclose the indentures and dispose of the collateral securities held thereunder without full realization of values.

Adequate relief can not be obtained under chapter XI of the Bankruptcy Act because a reorganization of the debtor involves primarily the readjustment of secured obligations.

9. The debtor has committed an act of bankruptcy within four months before the filing of this petition, the debtor having transferred while insolvent a portion of its property to one or more of its creditors with intent to prefer such creditors over its other creditors and has admitted in writing its inability to pay its debts.

10. It is the desire of petitioners that a plan of reorganization be effected with respect to the debtor and petitioners aver that only through a plan of reorganization developed and consummated pursuant to the provisions of chapter X may the debtor satisfactorily reorganize its affairs in the interest, and for the benefit, of its creditors.

Petitioners therefore pray:

1. That this Honorable Court enter an order approving this petition as properly filed under said chapter X.

2. That this Honorable Court enter an order appointing a trustee or trustees under said chapter X and authorizing and directing the debtor

to deliver possession of, and title to, its properties to said trustee or trustees.

3. That this Honorable Court enter an order requiring said trustee or trustees to give such notice to creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the court in said order may direct of a hearing to be held on such date as may be named in said order not less than thirty days and not more than sixty days after approval of this petition as required by section 161 of said chapter X.

4. That this Honorable Court enjoin or stay commencement or continuation of suits against the debtor until after final decree.

5. That this Honorable Court grant such other and further relief as may be required.

FL.
 ST.
 BO.

 Attorney for Petitioners.

895. Answer to Involuntary Petition for Corporate Reorganization under Chapter X.

District Court of the United States

District of _____

In the Matter of — Gas and	}	In proceedings for reorganization of a corporation Answer
Water Company,		
Debtor.		

A petition having been filed in the above court on the — day of —, 19—, praying that the — Gas and Water Company, the above debtor, be reorganized under the provisions of chapter X of the Bankruptcy Act, this respondent now appears and controverts the facts alleged in said petition as follows:

1. As to paragraph 1 of the petition, this respondent is without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein and therefore leaves petitioners to their proof thereof.

2. As to paragraph 2 of the petition, this respondent admits the same except in so far as it alleges that the debtor has had its principal place of business for a period in excess of six months next preceding the filing of this petition at — Street, —, —. This allegation respondent denies.

3. As to paragraph 3 of the petition, this respondent admits the debtor is unable to meet its debts as they mature, but upon information and belief denies that it is insolvent.

4. This respondent admits the allegations contained in paragraph 4 of the petition.

5. As to paragraph 5 of the petition, this respondent admits the same except in so far as it is alleged that (1) the fair value of the assets of the debtor is substantially less than as shown in the consolidated balance sheet; (2) that such assets at a fair valuation are not sufficient in amount to pay its debts. These allegations upon information and belief are denied by this respondent.

6. This respondent admits the allegations contained in paragraph 6 of the petition.

7. As to paragraph 7 of the petition, this respondent admits the same except in so far as it is alleged that under the proposed plan there are no adequate compensating benefits or advantages offered to secured creditors, and that under the plan as proposed the stockholders of the debtor will retain their interests although the assets of the debtor at a fair valuation are insufficient to justify the retention by the stockholders of any interests in the reorganized debtor. This allegation the respondent denies.

8. As to paragraph 8 of the petition, this respondent denies the same except in so far as it is alleged that the greater part of its securities are pledged with the — Bank of the city of —, which is admitted.

9. The debtor admits that it has admitted in writing its inability to pay its debts as they mature, but denies that this constitutes an act of bankruptcy. The other allegations of paragraph 9 are denied by the respondent. The respondent denies that it has committed an act of bankruptcy.

10. This respondent denies the allegations contained in paragraph 10 of the petition.

SEPARATE DEFENSES

This respondent respectfully urges that this court dismiss the petition filed herein for the following reasons:

First. That the petition does not disclose a need for reorganization under the provisions of chapter X of the Bankruptcy Act, nor is there any need for such reorganization under said Bankruptcy Act.

Second. No creditors are pressing their claims for payment.

Third. This respondent asserts that it can continue its business without reorganization under the provisions of chapter X of the Bankruptcy Act and without prejudice to its creditors, secured and unsecured.

Fourth. This respondent believes and therefore alleges that under the presently proposed plan of voluntary reorganization promulgated by this respondent, the requisite number of assents can be procured and that said plan of voluntary reorganization as proposed can best serve the interest of the creditors of the respondent.

RESERVATIONS IN POINT OF LAW

This respondent reserves the right, at or before the hearing on said petition, to move to dismiss the petition filed herein on the grounds that:

1. The petition discloses no valid act of bankruptcy.
2. The petition is improperly verified and not in accordance with the statute in such case made and provided.

Gas and Water Company,

By _____
Respondent.

CHAPTER 25

COURT OF CLAIMS OF THE UNITED STATES

Form

- 900. Petition in contract case.
- 901. Petition in tax case.
- 902. Petition in patent case.
- 903. Demurrer.
- 904. Plea to the jurisdiction.
- 905. Motion for call.

Form

- 906. Traverse by government.
- 907. Judgment.
- 908. Petition to the Supreme Court for a writ of certiorari to the Court of Claims.

INTRODUCTION.—This court was established by act of Congress of February 24, 1855 (10 Stat. L. 612). It has general jurisdiction (36 Stat. L. 1136; U. S. C., Title 28, § 250) of all "claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable," except "claims growing out of the late Civil War and commonly known as 'war claims'," and certain rejected claims.

It has jurisdiction also of claims of like character which may be referred to it by the head of any executive department involving controverted questions of fact or law.

It also has jurisdiction of the claims of disbursing officers of the United States for relief from responsibility for losses of Government funds and property by capture or otherwise, without negligence, while in the line of duty.

There is a statute of limitations which prevents parties from bringing actions on their own motion beyond 6 years after the cause of action accrued, but the departments may refer claims at any time if they were pending therein within the 6 years (U. S. C., Title 28, § 262).

By section 151, Judicial Code (36 Stat. L. 1135), whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limita-

tion should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: Provided, however, That if it shall appear to the satisfaction of the court upon the facts established that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.

Section 5, act of March 4, 1915 (38 Stat. 996), provides: "That from and after the passage and approval of this act the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States based upon or growing out of the destruction of any property or damage done to any property by the military or naval forces of the United States during the war for the suppression of the rebellion, nor to any claim for stores and supplies taken by or furnished to or for the use of the military or naval forces of the United States, nor to any claim for the value of any use and occupation of any real estate by the military or naval forces of the United States during said war; nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States."

By act of March 3, 1891, chapter 538 (26 Stat. L. 851, and Supplement to R. S., 2d ed., p. 913), the court is vested with jurisdiction of certain Indian depredation claims.

The act of June 25, 1910, chapter 423 (36 Stat. L. 851-852), "An act to provide additional protection for owners of patents of the United States, and for other purposes," conferred jurisdiction over claims against the United States for patent infringement.

From time to time Congress passes special acts conferring on the court jurisdiction over specific claims.

900. Petition in Contract Case.

In the Court of Claims

Construction Co. }

v. }

The United States. }

No. —

PETITION

Filed — — —, 19—

To the Honorable the Court of Claims:

The plaintiff, — Construction Company, respectfully represents:

I. Plaintiff is a corporation organized under the laws of the state of —, having its principal place of business at — Street, —, —.

II. On July 12, 1937, plaintiff entered into a contract with the United States, represented by Admiral —, U. S. Navy, head of the Procurement Division, Treasury Department, as contracting officer, whereby it undertook to construct in accordance with plans and specifications thereto attached, a new post-office building at —, —, for the lump-sum price of forty-seven thousand seven hundred and forty dollars (\$47,740.00). The work was to begin as soon as practicable after the date of notice to proceed and to be completed within three hundred (300) calendar days after receipt of such notice. Notice to proceed was received on July 30, 1937, thus fixing the contract date of completion to expire as of May 27, 1938. The pertinent parts of the contract, together with like portions of the specifications are attached hereto as "Exhibit A" and asked to be considered as a part hereof.

III. The contract provisions pertinent to this suit are as follows:

"Article 2. Specifications and drawings. The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detailed drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

"Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or

latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ, the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

Article 9 also has some bearing in that it contains the usual provision for damages for delay and authorizes the government in the event of delay to take charge of the work and complete it at the contractor's expense. The specifications in general reiterate the contract provisions and in addition contain the following:

Section 4, Paragraph 1, specifications (cover sheet):

"All excavation, grading, sodding, etc., shall be done that is required for the completion of the work in this contract."

Paragraph 39 of the General Conditions is also pertinent, which reads as follows:

"39. Payment for Temporary Heating.—Payment will be made for the cost of furnishing temporary heat during any period for which such heat is required which extends beyond that stipulated in the contract for the completion of construction, in cases in which such extended period of time results directly from changes made in the specifications pursuant to the provisions of the 23rd paragraph of these General Conditions; and no payments will be made on account of any other items of cost of delay, whether occasioned by a change in the specifications or otherwise."

One of the specified contract drawings, namely, "Survey of Post Office Site," (drawing number illegible on contractor's copy) purported to give the soil characteristics of the materials to be excavated under the contract and showed elevations of ledge rock as reported to have been encountered in the digging of certain test pits, at different locations over the site of the work. Such elevations varied from 510.3 feet to 514.5, or an average of 512.4 feet. Contract drawing No. 400 also showed these same test pits.

IV. The contractor promptly started the necessary excavation and very shortly after so doing discovered ledge rock at much higher elevations than those shown on the contract drawings above referred to, such rock being encountered at the site of the boiler room at an elevation of 522.7 feet, or an average of about 10 feet higher than the elevation shown on the contract drawings. Rock was encountered in all cases at higher elevations than shown on the drawings. This called for a largely increased amount of ledge rock excavation over that shown on the plans, and corresponding decrease of the easier work of soil excavation.

The government was represented on the work by a competent construction engineer, as the contracting officer's representative, and he was familiar with conditions as encountered and called the contractor's attention to

Article 4 of the contract, providing what should be done in the event of changed conditions being encountered. The contractor promptly notified the contracting officer of the changed conditions encountered and on September 2, 1937, wrote a formal letter to the same effect. What action the contracting officer took in the way of investigating the changed conditions, the plaintiff-contractor is not advised. Under direction of the construction engineer, the contractor proceeded with the work.

At one time later, January 3, 1938, the construction engineer requested the contractor to submit suggestions for changes in the grading, flag pole relocation, and drive-way changes in order to avoid the removal of certain excessive rock being encountered. Nothing came of this suggestion.

On January 18, 1938, in response to the government's request, the contractor submitted a proposal in the sum of seven thousand four hundred thirty-six dollars and two cents (\$7,436.02) for the cost of additional rock excavation encountered and done up to that date.

On May 5, 1938, having completed the rock excavation and grading, the contractor submitted a revised proposal in the sum of fourteen thousand four hundred seventy dollars and seventy-two cents (\$14,470.72), as representing the cost of removing excavated ledge rock over the cost of removing common excavation in the same quantity. The contracting officer, on May 19, 1938, rejected the contractor's proposal on the ground that all excavation, including rock, was covered by the contract price. The contractor appealed from this ruling, but on April 24, 1939, the acting secretary of the treasury affirmed the decision of the contracting officer.

Plaintiff says that the existence of ledge rock in large quantities in locations where the contract represented the materials to be earth, constituted a changed condition within the meaning of Article 4 of the contract, and that it is entitled to an equitable adjustment of the contract price by reason of such changed conditions.

It further says that an equitable adjustment would be the allowance of the difference in cost between the excavation of all rock encountered above the elevations to which it was represented to extend and the elevations to which it actually extended, less the cost of removing a like quantity of earth and that such cost would amount to about fourteen thousand four hundred and seventy dollars and seventy-two cents (\$14,470.72), more or less. Plaintiff asks judgment in this amount on this item of claim.

V. Plaintiff had planned to and would have completed the entire work covered by the contract well in advance of the contract date for completion, or on or about January 16, 1938. Its schedule of operations called for completion on such a date and the work could and would have been completed except for two circumstances: First. The excavation of large additional quantities of ledge rock over that shown on the plans as to be expected. The doing of this rock excavation required greatly increased time over what would otherwise have been necessary; and second, the government at one time requested the contractor to submit an estimate for certain changes in the lintels. At the time the request was made, the brickwork had ad-

vanced to the level of the lintels and could not proceed until the contractor knew whether the change was to be made. About two weeks afterwards the contractor was informed that the change was abandoned and the work was allowed to proceed. This delayed the completion of the whole work for two weeks.

By reason of the delays enforced, as above described, the contractor did not complete the building until on or about May 26, 1938.

From January 16, 1938, until the close of winter weather in March, 1938, the contractor was obliged to furnish temporary heat at a cost of nine hundred eighty-seven dollars and thirteen cents (\$987.13), for which it has not been reimbursed. Paragraph 39 of the general conditions, quoted above, provided for payment for temporary heat under certain conditions. The plaintiff says that these provisions fairly interpreted entitled it to compensation for temporary heat furnished from January 16, 1938, to close of winter weather. Claim on this account is therefore made in the sum of nine hundred eighty-seven dollars and thirteen cents (\$987.13).

VI. As stated in the preceding paragraphs, plaintiff was prepared to and could have completed the entire work covered by its contract on or about January 16, 1938. By reason of the delays, as hereinbefore set forth, work was not completed until on or about May 26, 1938. During this period, January 16th to May 26th, 1938, the contractor was obliged to employ and maintain certain supervisory and steady-time employees, whose services would not otherwise have been required. It was also required to and did provide workmen's compensation, liability insurance, old age benefits and unemployment insurance, and incurred other fixed and necessary expenses that would have been unnecessary and not incurred but for the delays above-described. The president of the plaintiff company also spent considerable time on the job due to the rock excavation, and incurred considerable expenses, such as his own salary, hotel bills, and living expenses, during his stay on the job. The sum of the expenses so unnecessarily incurred amounts to some four thousand dollars (\$4,000.00) more or less. Claim is made in that amount.

VII. No other action has been had on said claim in congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the plaintiff has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government. The plaintiff is a citizen of the United States. And the plaintiff claims nineteen thousand four hundred fifty-seven dollars and eighty-five cents (\$19,457.85).

Attorney for plaintiff.

STATE OF _____, }
 COUNTY OF _____. } ss:

_____, being duly sworn, deposes and says: I am president of the plaintiff corporation, the plaintiff in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information and belief.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL]

Notary Public,

Statutory References.

Air mail contracts canceled by United States, 9A F. C. A., Title 39, § 469f; U. S. C. A., Title 39, § 469f; id. U. S. C.

Claims by aliens, necessary allegations, 8 F. C. A., Title 28, § 261; U. S. C. A., Title 28, § 261; id. U. S. C.

Claims for unlicensed use of patents by United States, 9 F. C. A., Title 35, § 68; U. S. C. A., Title 35, § 68; id. U. S. C.

Claims pending in other courts, 8 F. C. A., Title 28, § 260; U. S. C. A., Title 28, § 260; id. U. S. C.

Claim to recover penalties assessed for violation of Eight-hour Law, 9A F. C. A., Title 40, § 324; U. S. C. A., Title 40, § 324; id. U. S. C.

Commissioner for court, 8 F. C. A., Title 28, §§ 269, 270; U. S. C. A., Title 28, §§ 269, 270; id. U. S. C.

Concurrent jurisdiction of District Courts in certain cases, 7 F. C. A., Title 28, § 41 (20); U. S. C. A., Title 28, § 41 (20); id. U. S. C.

Court of Claims and proceedings therein, 8 F. C. A., Title 28, §§ 241 to 293; U. S. C. A., Title 28, §§ 241 to 293; id. U. S. C.

Form of petition, verification, 8 F. C. A., Title 28, §§ 265, 761, 762; U. S. C. A., Title 28, §§ 265, 761, 762; id. U. S. C.

Jurisdiction, 8 F. C. A., Title 28, §§ 250 to 257, 259 to 261; U. S. C. A., Title 28, §§ 250 to 257, 259 to 261; id. U. S. C.

Limitation of actions, 8 F. C. A., Title 28, § 262; U. S. C. A., Title 28, § 262; id. U. S. C.

Loyalty; pleading, proof, issues, and jurisdiction, 8 F. C. A., Title 28, §§ 265 to 267, 290; U. S. C. A., Title 28, §§ 265 to 267, 290; id. U. S. C.

Motion for new trial, 8 F. C. A., Title 28, §§ 281, 282; U. S. C. A., Title 28, §§ 281, 282; id. U. S. C.

Power to make rules of practice and procedure, 8 F. C. A., Title 28, § 263,

761; U. S. C. A., Title 28, §§ 263, 761; id. U. S. C.

Pretrial examination of claimant, 8 F. C. A., Title 28, § 274; U. S. C. A., Title 28, § 274; id. U. S. C.

Reference of cases pending before executive departments, 8 F. C. A., Title 28, §§ 254 to 256; U. S. C. A., Title 28, §§ 254 to 256; id. U. S. C.

Reference of private claims pending in Congress, 8 F. C. A., Title 28, § 257; U. S. C. A., Title 28, § 257; id. U. S. C.

Rules and statutes of procedure, 8 F. C. A., Title 28, § 761; U. S. C. A., Title 28, § 761; id. U. S. C.

Service of process, appearance of government attorney, 8 F. C. A., Title 28, § 763; U. S. C. A., Title 28, § 763; id. U. S. C.

Set-off or counterclaim, 8 F. C. A., Title 28, §§ 250, 252; U. S. C. A., Title 28, §§ 250, 252; id. U. S. C.

Suits against government-aided railroads, 10A F. C. A., Title 45, § 87; U. S. C. A., Title 45, § 87; id. U. S. C.

Taking evidence, 8 F. C. A., Title 28, §§ 275 to 278; U. S. C. A., Title 28, §§ 275 to 278; id. U. S. C.

Rules of Court of Claims.

See 8 F. C. A., Appendix 4, pp. 754-765, Rules 1-101.

Allegation of true allegiance to government, Rule 10f.

Amended petition, Rules 14-16.

Answers alleging fraud on government, Rule 26.

Calls on department or agencies of government for information to be used in filing amended petition, Rule 14.

Depositions, Rules 54-71.

Form, verification, and requirements of petition, Rules 1, 8-12.

Intervening petition, Rules 17, 18.

Motions and pleadings by defendant, Rules 19-27.

Motions to make petition more specific, bills of particulars, Rule 13.

Necessity of attaching copy of contract, Rule 12.

Necessity of specifying Act of Congress or regulation of executive department, Rule 11.

Petition by executor, administrator, next friend, or guardian, receiver, trustee in bankruptcy, or other judicial representative, copy of appointment with petition, Rule 9.

Requirements of petition in patent cases, Rule 38.

Set-off or counterclaim, Rule 21.

NOTES TO DECISIONS

In General.

Court of claims has no equitable jurisdiction. *Bonner v. United States*, 9 Wall. (76 U. S.) 156, 19 L. ed. 666.

Court of claims, in deciding on rights of claimants, is not bound by any special rules of pleading. *United States v. Burns*, 12 Wall. (79 U. S.) 246, 20 L. ed. 388.

Averment of allegiance is no longer required in view of the amnesty proclamation of December 25, 1868. *Armstrong v. United States*, 13 Wall. (80 U. S.) 154, 20 L. ed. 614; *Pargoud v. United States*, 13 Wall. (80 U. S.) 156, 20 L. ed. 646; *Austin v. United States*, 155 U. S. 417, 39 L. ed. 206, 15 Sup. Ct. 167.

Court of claims can not hear and determine any claim against the United States, except in cases and under conditions defined by Congress. *United States v. Gleeson*, 124 U. S. 255, 31 L. ed. 421, 8 Sup. Ct. 502.

8 F. C. A., Title 28, § 250 (1), (2); U. S. C. A., Title 28, § 250 (1), (2); id. U. S. C. evidently contemplates four distinct classes of cases: (1) Those founded upon the constitution or any law of Congress; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words "not sounding in tort" are in terms referable only to the fourth class of cases. *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. 762; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. 349.

A petition giving a concise statement of the facts relied on, with reasonable notice to the government of the matters it will be called upon to meet, is sufficient, and a prayer for alternative relief may be the basis of the judgment. *Bull v. United States*, 295 U. S. 247, 79 L. ed. 1421, 55 Sup. Ct. 695.

8 F. C. A., Title 28, § 250; U. S. C. A., Title 28, § 250; id. U. S. C. contemplates

that a claim may accrue and be sued on even though the damages sought be unliquidated. *United States v. Atlantic Mut. Ins. Co.*, 298 U. S. 483, 80 L. ed. 1296, 56 Sup. Ct. 889, 1936 A. M. C. 993, revg. 80 Ct. Cls. 11.

The petition must contain a succinct statement of the facts on which the claim is based. *United States v. Stratton* (C. C. A. 5), 88 Fed. 54.

Petition containing statement of a general nature was insufficient. *United States v. Stratton* (C. C. A. 5), 88 Fed. 54.

Suits against the United States can be maintained only by permission of the United States and then only in the manner and under the restrictions presented by the enabling statutes. *Jewell v. United States* (D. C.-Ky.), 27 Fed. Supp. 836; *Dellaporta v. United States* (D. C.-Mass.), 27 Fed. Supp. 839.

Verification of the petition is not a jurisdictional requirement and may be done at any time. In *re Griffins Case*, 13 Ct. Cls. 257.

The forms of pleading in the Court of Claims are not so strict a character as to preclude, even in cases where judgment can be rendered, such judgment as the facts demand. A plain statement of facts is all that is necessary. *Atlantic Works v. United States*, 46 Ct. Cls. 57.

Relief depends upon circumstances of each case. *Clark v. United States*, 46 Ct. Cls. 416.

Petition alleging that plaintiff has "no information or knowledge upon which to base an allegation," as to his claim, held to seek a right of discovery of which the Court of Claims is without jurisdiction. *Blenkner v. United States*, 65 Ct. Cls. 18.

Court may award judgment conforming to facts stated and proved without regard to pleadings. *Electric Boat Co. v. United States*, 66 Ct. Cls. 333.

Matters once determined in a court of competent jurisdiction may not again be called in question by parties or their privies against objection, and estoppel

extends to every material allegation or statement which, having been made on one side and denied on other, was at issue in cause, and was determined therein. *Morse Dry Dock Co. v. United States*, 77 Ct. Cls. 57.

Forms of pleadings held such that judgment could be awarded plaintiff upon facts alleged, though due in different aspect from that in which demand was stated in petition. *M. A. Long Co. v. United States*, 79 Ct. Cls. 656.

Court of Claims is required by its rules of pleading to consider the facts in a case as alleged in the petition or established by evidence irrespective of plaintiff's application of them with respect to right of recovery. *Hampton v. United States*, 82 Ct. Cls. 162.

Contracts Express or Implied.

The settled distinction between torts and contracts can not be evaded by framing the claim on an implied contract. *Gibbons v. United States*, 8 Wall. (75 U. S.) 269, 19 L. ed. 453; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. 1011.

Petition to recover royalties from government for use of patented devise was properly dismissed for failing to show contract express or implied. *E. W. Bliss Co. v. United States*, 253 U. S. 187, 64 L. ed. 852, 40 Sup. Ct. 455.

Court of Claims properly dismissed suit for breach of an alleged agreement for the purchase of a quantity of wool when it did not appear in the petition that any agreement was ever reached as to terms and conditions of purchase. *L. Richardson & Co. v. United States*, 266 U. S. 541, 69 L. ed. 430, 45 Sup. Ct. 155, affg. 58 Ct. Cls. 717.

The petition provided for in 8 F. C. A., Title 28, § 287; U. S. C. A., Title 28, § 287; id. U. S. C. must allege that the petitioner is or has been indebted to the United States. *Gerding v. United States*, 26 Ct. Cls. 319.

Where plaintiff's petition fails to allege or show a contract, express or implied, for compensation for alleged furnishing of governmental suggestions and information, the petition fails to state a cause of action. *Barry v. United States*, 83 Ct. Cls. 413.

Limitation of Actions.

General rule that limitation does not operate by its own force as bar, but is

defense, and party making such defense must plead statute if he wishes benefit of its provisions, has no application to suits in Court of Claims against United States. *Finn v. United States*, 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. 32; *Farmers Cotton Oil Co. v. United States*, 84 Ct. Cls. 468.

Petition alleging that amount sought to be recovered was paid to government more than six years prior to filing of petition, and under coercion, was in tort and barred. *Williams v. United States*, 63 Ct. Cls. 668.

Correction of name of plaintiff, or a mere change in the capacity in which suit is brought, was not the institution of a new suit. *Colton v. United States*, 71 Ct. Cls. 138.

Particular Cases.

Claim to recover back internal revenue taxes illegally exacted. *Christie-Street Comm. Co. v. United States* (C. C. 8), 136 Fed. 326.

Petition alleging that when plaintiff entered into a contract of settlement he was in distressing financial circumstances was insufficient to set up fraud or duress. *De Luca v. United States*, 69 Ct. Cls. 262.

Intervening petition containing broad and sweeping prayer for general relief was sufficient to cover a specific claim for damage to vessels. *Acme Operating Corp. v. United States*, 74 Ct. Cls. 82.

Set-Off or Counterclaim.

Forms of pleading in Court of Claims are not to be strict in character, and it is not necessary to plead set-off or counterclaim. *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. 45, 32 Ct. Cls. 611; *Vulcanite Portland Cement Co. v. United States*, 74 Ct. Cls. 692.

Government not entitled to file counterclaim in action in Court of Claims based on contract of emergency fleet corporation after claimant has dismissed the action and commenced action on the same claim in a state court. In *re Skinner & Eddy Corp.*, 265 U. S. 86, 68 L. ed. 912, 44 Sup. Ct. 446.

Set-off and counterclaims are authorized by 8 F. C. A., Title 28, § 763; U. S. C. A., Title 28, § 763; id. U. S. C. *United States v. Saunders* (C. C. A. 1), 79 Fed. 407.

Counterclaim for damages set up under 8 F. C. A., Title 28, § 763; U. S. C. A., Title 28, § 763; id. U. S. C. *United States v. Hurlay* (C. C. A. 8), 182 Fed. 776.

Where plaintiff filed replication to defendant's counterclaim, setting up new matter, and the petition and the counterclaim are dismissed on the merit, plaintiff can not, after the term has expired, maintain a suit on the new matter set up in the replication. *Wright v. United States*, 62 Ct. Cls. 572.

In former employee's action against government for salary withheld, government could recover on counterclaim, an unpaid fine imposed on plaintiff in a prior

criminal proceeding. *O'Leary v. United States*, 82 Ct. Cls. 305.

Where all the facts and questions are before the court, a set-off or counterclaim may be allowed by way of recoupment without any formal pleadings thereof against a plaintiff who establishes his right to recover on his claim against the government, the government's claim being fully disclosed by plaintiff's petition. *American Sanitary Rag Co. v. United States*, 84 Ct. Cls. 417.

901. Petition in Tax Case.

In the Court of Claims

— Motorcycle Co.
v.
United States.

} No. —

PETITION

(Filed — — —, 19—.)

To the Honorable the Court of Claims:

The plaintiff, by its counsel, —, respectfully shows:

1. The plaintiff is a corporation duly incorporated under the laws of the state of — on or about — —, 19—, with its principal office and place of business at —, —.

2. During the taxable years from — —, 19—, to — —, 19—, the plaintiff sold and delivered to certain states, municipal corporations, and other governmental agencies, a large number of commercial vehicles, including motorcycles, side-cars, and vans, together with certain repair parts therefor and accessories thereto.

3. The plaintiff duly filed with the collector of internal revenue at —, —, as required by the Revenue Acts of 1921 and 1924, and the regulations of the commissioner of internal revenue promulgated thereunder, reports of its income from the sale of commercial vehicles, motorcycles, side-cars, and vans, and duly paid the taxes shown to be due thereon.

4. The returns thus filed and the taxes so paid included taxes on all commercial vehicles, repair parts, and accessories sold to states, municipal corporations, and governmental agencies during the period from — —, 19—, to — —, 19—.

5. During the period from — —, 19—, to — —, 19—, the plaintiff paid to the collector of internal revenue at —, —, the total amount of — dollars (\$—), representing excise taxes on commercial vehicles, motorcycles, side-cars, and vans sold to states and their political subdivisions, amounting to — dollars (\$—) and on the sale of repair parts and accessories sold to states and their political subdivisions, amounting to — dollars (\$—).

6. The excise taxes in the above amount of — dollars (\$—) assessed and collected from the plaintiff on the sale of its commercial vehicles, repair parts, and accessories sold to states and their political subdivisions were erroneously and illegally assessed and collected, and if the laws and regulations purport to authorize such assessment and collection they are in contravention of the Constitution of the United States and illegal and void to that extent.

7. On or about —, 19—, the plaintiff duly filed with the collector of internal revenue at —, —, a claim for refund of excise taxes in the amount of — dollars (\$—) or such greater amount as is legally refundable paid on commercial vehicles, including motorcycles, side-cars, and vans, sold to states or their political subdivisions.

8. Less than two years prior to the filing of this petition the above claim for refund of — dollars (\$—) was rejected in full by the commissioner of internal revenue.

9. Under the claim for refund of — dollars (\$—) filed by the plaintiff, as aforesaid, the plaintiff was and is entitled under the provisions of the Revenue Act of 1926, and provisions of law now in effect, to a refund of the excise taxes paid as aforesaid, and the rejection of the claim for refund by the commissioner of internal revenue was wrongful and illegal.

10. On or about —, 19—, the plaintiff duly filed with the collector of internal revenue at —, —, a claim for refund of excise taxes in the amount of — dollars (\$—) or such greater amount as is legally refundable, paid on the sale of parts and accessories of motorcycles sold to states or their political subdivisions.

11. Less than two years prior to the filing of this petition the above claim for refund of — dollars (\$—) was rejected in full by the commissioner of internal revenue.

12. Under the claim for refund of — dollars (\$—) filed by the plaintiff, as aforesaid, the plaintiff was and is entitled under the provisions of the Revenue Act of 1926, and provisions of law now in effect, to a refund of the excise tax paid as aforesaid, and the rejection of the claim for refund was wrongful and illegal.

13. The United States of America is now wrongfully and unlawfully withholding from the plaintiff, without its consent and against its will, the above amount of — dollars (\$—) with interest thereon.

14. The plaintiff is and has always been the sole owner of the claims herein referred to and has not assigned or transferred the whole or any part thereof or interest therein. It has at all times borne true allegiance to the government of the United States and has not in any way aided, abetted, or given encouragement to rebellion against the said government. It believes the facts stated herein to be true and that it is justly entitled to the amount claimed from the United States after allowing all just credits and offsets.

Wherefore, the plaintiff prays for judgment against the United States of America in the sum of — dollars (\$—), with interest from the respective dates of payment as provided by law and its costs herein.

— Motorcycle Company.

By _____
Counsel for plaintiff,
_____ Street,
_____, ____.

District of Columbia, ss:

—, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in this case; that he has read the foregoing petition, and that the matters stated therein are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this — day of —, 19—.

[SEAL]

Notary public.

Source of Form.

From the record in Indian Motorcycle
Co. v. United States, 283 U. S. 570, 75
L. ed. 1277, 51 Sup. Ct. 601.

Cross-Reference.

In connection with Forms 901 to 904,
see notes to Form 900.

902. Petition in Patent Case.

In Court of Claims of the United States

No. _____

v.

United States.

Filed _____.

To the Honorable the Court of Claims:

The claimant, by —, his attorneys, respectfully represents:

FOR A FIRST CAUSE OF ACTION UPON INFORMATION AND BELIEF

1. At all times hereinafter mentioned the claimant has been and still is a citizen of the French Republic, and resides at —, Paris, France, and was beyond the seas during —, 19—, and since then was at no time in the United States before — —, 19—.

2. The French Republic accords to citizens of the United States the right to prosecute claims against it in its courts, and such claims may include those for breach of contract and for the infringement of patents.

3. On or about the — day of —, 19—, letters patent No. — were duly issued in the name of the United States of America, under the seal of the Patent Office, and signed by the Commissioner of Patents, to the

claimant, upon his application therefor, for a certain new and useful invention theretofore made by the claimant for the stabilization and control of airplanes, to wit: The control of the whole equilibrium of the machine by the simple oscillation of a single lever moving in all directions and operated by one hand, which has since become popularly known as the "joy stick." A further and fuller description of the invention therein patented will appear in said patent or a duly authenticated copy thereof here in court to be produced. This invention was not known or used by others in this country before the claimant's invention thereof and not patented or described in any printed publication in this or any foreign country, before the claimant's invention or discovery thereof, or more than two years prior to the claimant's application and not in public use or on sale in this country for more than two years prior to the claimant's application. The said patent granted to the claimant, his heirs, or assigns for the term of seventeen years the exclusive right to make, use, and vend the invention covered thereby throughout the United States and the territories thereof. The claimant and his agents have never made or sold the said patented article in the United States.

4. Thereafter, in —, 19— and continuously since that date and up to the present time, the invention described in and covered by the said patent was used and manufactured by and for the defendant, without license of the owner thereof, the claimant, or lawful right to use or manufacture the same, in airplanes made and used by and for defendant in large amounts. Such airplanes were manufactured by and for the defendant in the factories of the C Aeroplane and Motor Corporation, —, —; S Aircraft Corporation, —, —; T-M Aircraft Corporation, —, —; W-M Aircraft Corporation, —, —; S Aeroplane Company, —, —; the B Company, —, —; LWF Engineering Company, —, —; A Engineering & Sales Company, —, —; B Airplane Company, —, —; D-W Airplane Corporation, —, —; SF Aircraft Corporation, —, —; P Motor Car Company, —, —, and other manufacturers in the United States, the total amount of such manufacture from —, 19—, until — —, 19—, being — airplanes. Further infringing airplanes were manufactured by and for the defendant in large amounts since — —, 19—, and up to the present time, the extent of which manufacture the claimant is unable further to particularize without examining copies of consolidated reports in the war, navy, and post-office departments respectively, by years and types, of the airplanes manufactured by and for those departments during the period above named. The claimant applied for such consolidated reports to the war, navy, and post-office departments respectively, but his applications were denied, as appears from the letters attached as exhibits to the motions filed by the claimant in this court — —, 19—, for calls on the said departments for the said information and papers. After such denial by the said departments respectively, and on — —, 19—, the claimant filed in this court motions, as referred to above, for calls on the said departments respectively for the said informa-

tion and papers. The said motions were overruled by this court — —, 19—, on the defendant's objections thereto but with no hearing or other reply of the claimant. The infringing airplanes were used by and for the defendant in the army and navy from —, 19— and up to the present time, and in the post-office department since — —, 19—, and up to the present time. On or about the — day of —, 19—, in Paris, France, the claimant duly notified the defendant, through its representative, Colonel —, of such infringement, but defendant continued to make and use the patented article of the claimant to his great damage. The damage caused the claimant by the aforesaid manufacture and use is a large sum, to wit: — dollars (\$—), being the fair and reasonable value of a license under the claimant's said patent for the said manufacture up to — —, 19—, and use of his invention covered thereby, together with such further sum as will compensate the claimant for the defendant's infringement in airplanes built since — —, 19—, and up to the present time, which infringement the claimant is at present unable further to particularize, as stated above in this paragraph. The above-mentioned acts of infringement by and for the defendant give rise to a right of action in the claimant against the United States in this court by virtue of the Act of June 25, 1910, ch. 423, 36 Stat. 851, as amended by the Act of July 1, 1918, ch. 114, 40 Stat. 704, 705, and by virtue of section 155 of the Judicial Code and by virtue of the International Convention concluded March 20, 1883, 25 Stat. 1372, as modified by the Additional Act concluded December 14, 1900, 32 Stat. 1936, as revised by the International Convention signed June 2, 1911, 38 Stat. 1645.

5. No action upon the claimant's claim has been had by or before congress or any executive department of the government, except the claimant presented his claim to the secretary of war, who declined to allow it; and the claimant never brought, nor has pending in any court, any suit or process against any other person, firm, or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

6. The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of said claim, or of any part thereof or interest therein, has been made.

6A. The claimant is not and never has been in the employment or service of the government of the United States.

7. The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

8. The claimant has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the government of the United States, and he believes the facts as stated herein to be true.

FOR A SECOND CAUSE OF ACTION UPON INFORMATION AND BELIEF

9. The claimant repeats all the allegations of paragraphs 1 and 2, as fully as if set forth at length herein.

10. On or about the — day of —, 19—, the — day of —, 19—, and the — day of —, 19—, letters patent Nos. — and —, respectively, were duly issued by the French Republic to the claimant for certain new and useful improvements in the control and stabilization of airplanes by a lever, as more fully will appear in said patents or duly authenticated copies thereof here in court to be produced. The said patents granted to the claimant the exclusive right to make, use, and sell the inventions covered thereby throughout the territory of the French Republic.

11. Thereafter, from — —, 19—, to — —, 19—, and while said letters patent of the French Republic were in full force and effect, to the knowledge of the defendant, the inventions described in and covered by the said letters patent were used, manufactured, and vended by and for the defendant in the territory of the French Republic in airplanes made, used, and vended by and for the defendant in large amounts, to wit, — airplanes built for the defendant in France and England, and the defendant agreed to pay and the claimant agreed to receive a reasonable compensation therefor, to wit: — dollars (\$—).

12. No part of the said sum has been paid although it was duly demanded by the claimant of the defendant through its representative, Colonel —, on or about the — day of —, 19—, in Paris, France, which breach of the aforesaid implied contract gives rise to a right of action in the claimant against the United States in this court by virtue of sections 145 and 155 of the Judicial Code.

13. The claimant repeats all the allegations of paragraphs 5, 6, 6A, 7, and 8, as fully as if set forth at length herein.

Wherefore, the claimant prays that he may have judgment for — dollars (\$—) together with fair compensation for the defendant's infringement in airplanes manufactured from — —, 19—, and up to the present time, with such costs and interest as may be allowed, and to such further relief as may be just.

Attorneys for claimant.

Source of Form.

From record in *United States v. Esnault-Pelterie*, 303 U. S. 26, 82 L. ed. 625, 58 Sup. Ct. 412.

Statutory References.

Claims by aliens, necessary allegations, 8 F. C. A., Title 28, § 261; U. S. C. A., Title 28, § 261; id. U. S. C.

Claims for unlicensed use of patents by United States, 9 F. C. A., Title 35, § 68; U. S. C. A., Title 35, § 68; id. U. S. C.

Rules of Court of Claims.

Requirements of petition in patent cases, Rule 38.

NOTES TO DECISIONS

In General.

Alien filing a petition must allege that the country of which he is a citizen accords to the citizens of the United States

right to prosecute claim against government of such country. *Choremi v. United States* (D. C.-Mass.), 28 Fed. (2d) 913.

903. Demurrer.

In the Court of Claims

No. _____

Company, a Corporation,
Plaintiff,

v.

United States, Defendant.

DEMURRER TO PLAINTIFF'S PETITION

(Filed — —, 19—)

Comes now the defendant by its assistant attorney-general and demurs to plaintiff's petition herein and moves to dismiss the same on the following grounds, to wit:

1. That said petition does not state facts sufficient to constitute a cause of action against the defendant.
2. That the court has no jurisdiction of said action, same being barred by the statute of limitations.

Assistant attorney-general._____
Attorney.**Source of Form.**Brownstein-Louis Co. v. United States,
90 Ct. Cls. 1.Motions and pleadings by defendant,
Rules 19-27.Motion to make petition more specific,
bill of particulars, Rule 13.**Rules of Court of Claims.**

Form, requirements and filing of demurrers, Rules 19, 20, 23-25, 27.

904. Plea to the Jurisdiction.

(Caption.)

Comes now the United States by and through its assistant attorney-general, appearing especially for the purpose of this plea, and says that this court is without jurisdiction to permit the filing or prosecution of the claims contained in the above-entitled petition, the filing of which was attempted and ostensibly accepted by the clerk of this court on — —, 19—, for the reason that each and every said claim contained in said petition is a claim in respect to which the above-named petitioners on said date had pending, and still have pending, in the United States District Court for the District of Columbia, a suit against the United States Shipping Board, the United States Shipping Board Merchant Fleet Corporation, formerly the United States Shipping Board Emergency Fleet Corporation, — as Secretary of Commerce of the United States, and the United States Maritime Commission, which parties at the time when the cause of action alleged in said suit arose were in respect thereto acting and professing to act mediately and immediately under the authority of

the United States, all as more particularly appears in the summons and complaint of said suit, a true copy of which is appended hereto, marked "Exhibit A," and by this reference incorporated herein as a part hereof.

Wherefore, the United States prays dismissal of the petition and that the purported filing of the claims and each of them be quashed and stricken from the records of the clerk of this honorable court.

Assistant attorney-general.

Attorneys.

Statutory Reference.

Claims pending in other courts, 8 F. C. A., Title 28, § 260; U. S. C. A., Title 28, § 260; id. U. S. C.

Rules of Court of Claims.

Motions and pleadings by defendant, Rules 13, 19-27.

NOTES TO DECISIONS

In General.

The only purpose of 8 F. C. A., Title 28, § 260; U. S. C. A., Title 28, § 260; id. U. S. C. was to require an election between a suit in the Court of Claims and one brought in another court against an agent of the government. *Matson Nav. Co. v. United States*, 284 U. S. 352, 76 L. ed. 336, 52 Sup. Ct. 162, 1932 A. M. C. 202.

8 F. C. A., Title 28, § 260; U. S. C. A., Title 28, § 260; id. U. S. C. applies to suits against the United States, and where such suit is pending in another court, the Court of Claims is without jurisdiction irrespective of priority of commencement of suit. *Matson Nav. Co. v. United States*, 72 Ct. Cls. 210.

905. Motion for Call.

In the Court of Claims

v.
United States.

No. _____

MOTION FOR CALL

Now comes the plaintiff, and moves that this Honorable Court call on the war department for the following information and papers, necessary in this cause, and relevant, material, and competent:

1. Copy of contract between — Company and the government, of date unknown, but probably early in 19—, providing for the relocation and building of a line of the — Railroad adjacent and pertinent to the construction of — Dam, near —, —, on the — River.

Attorney for plaintiff.

(Here follows memorandum in support of motion.)

Statutory Reference.

Calling upon departments for information, 8 F. C. A., Title 28, § 272; U. S. C. A., Title 28, § 272; id. U. S. C.

Rules of Court of Claims.

Calls on departments or agencies of government for information and use thereof, Rules 14, 32-36.

NOTES TO DECISIONS**In General.**

The call upon the department under 8 F. C. A., Title 28, § 272; U. S. C. A.,

Title 28, § 272; id. U. S. C. is in the nature of a subpoena duces tecum. In re Calls for Evidence, 33 Ct. Cls. 354.

906. Traverse by Government.

(Caption.)

And now comes the assistant attorney-general, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Assistant attorney-general.

Rules of Court of Claims.

Motions and pleadings by defendant, Rules 13, 19-27.

Necessity for traversal of allegation of true allegiance to government, Rule 10f. Set-off or counterclaim, Rule 21.

907. Judgment.

(Caption.)

At a Court of Claims held in the city of — on the — day of —, 19—, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff's patent is valid and has been infringed by the United States and that he is entitled to compensation therefor under the Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, 40 Stat. 705, and section 155 of the Judicial Code.

Cross-Reference.

See notes to Form 908.

Opinion, findings of fact, and conclusions of law, 8 F. C. A., Title 28, § 764; U. S. C. A., Title 28, § 764; id. U. S. C.

Statutory References.

Motion for new trial, 8 F. C. A., Title 28, §§ 281, 282; U. S. C. A., Title 28, §§ 281, 282; id. U. S. C.

Rules of Court of Claims.

Motions for new trial and for amendment of findings, Rules 91-97.

Requirements and form of special findings of fact, Rules 75-78.

NOTES TO DECISIONS**In General.**

8 F. C. A., Title 28, § 764; U. S. C. A., Title 28, § 764; id. U. S. C. is not complied with where there is no such specific

finding of facts as to exhibit exactly the services for which the claimant asks compensation. *United States v. Stratton* (C. C. A. 5), 88 Fed. 54.

It is the duty of the trial court to set forth the facts of the cause specifically in its findings, as well as its conclusions on all of the questions of law involved. *United States v. Kelly* (C. C. A. 9), 89 Fed. 946.

Questions of loyalty, citizenship, and assignment, being matters of defense, special findings of fact on these questions are unnecessary where they are admitted or no question is raised as to them. *Williams Inv. Co. v. United States*, 77 Ct. Cls. 396.

Where question of negligence arises, Court of Claims is required to make an ultimate finding on such issue. In re

Moran Touring & Transportation Co., Inc., 78 Ct. Cls. 526.

New Trial.

In the application of 8 F. C. A., Title 28, § 281; U. S. C. A., Title 28, § 281; id. U. S. C., the court has adopted rules on the subject of new trials conforming in substance to the common-law requisites of a new trial. *Nance v. United States*, 23 Ct. Cls. 463.

A motion to amend findings may be considered as a motion for a new trial. *Plumley v. United States*, 45 Ct. Cls. 185. *Mod. 226 U. S. 546, 57 L. ed. 342, 33 Sup. Ct. 139.*

908. Petition to the Supreme Court for a Writ of Certiorari to the Court of Claims.

(Caption.)

The solicitor general, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

OPINION BELOW

The opinion of the court below is reported in *Indian Motorcycle Co. v. United States*, 80 Ct. Cls. 594, 9 Fed. Supp. 608.

JURISDICTION

The judgment of the court below was entered — —, 19—. The jurisdiction of this court is invoked under section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the sale of vehicles by the respondent to dealers acting as independent contractors is exempt from the federal excise tax, when prior to the order to respondent, the dealers had contracted to sell the identical vehicles ordered to municipal corporations and other political subdivisions and agencies of states for use in the performance of essential governmental functions.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11-12.

STATEMENT

The findings of fact of the Court of Claims may be summarized as follows: * * *

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the case at bar is controlled by the decision of this court in *Indian Motorcycle Co. v. United States*, 283 U. S. 570.

2. In holding that the implied constitutional prohibition against the taxation of instrumentalities of a state performing governmental functions was applicable to an excise tax upon the sale of vehicles purchased by a state instrumentality, not directly from the respondent manufacturer but upon orders placed with independent dealers.

3. In holding that the application of the implied constitutional prohibition against taxation of instrumentalities of a state performing governmental functions is to be determined by the fact that the economic burden upon the state instrumentality is as great in amount in this case as in the case of a sale direct to the state instrumentality by the manufacturer.

4. In giving judgment for the respondent for the tax in dispute.

REASONS FOR GRANTING THE WRIT

* * *

Wherefore, it is respectfully submitted that this petition should be granted.

Solicitor general.

—, 19—.

Source of Form.

From record in *United States v. Indian Motorcycle Co.*, 296 U. S. 600, 80 L. ed. 425, 56 Sup. Ct. 116.

Cross-Reference.

See notes to Form 907.

Statutory References.

Appeal by government, 8 F. C. A., Title 28, § 765; U. S. C. A., Title 28, § 765; id. U. S. C.

Certifying questions to Supreme Court, 8 F. C. A., Title 28, § 288; U. S. C. A., Title 28, § 288; id. U. S. C.

Certiorari by Supreme Court for review of questions of law, 8 F. C. A., Title 28, § 288; U. S. C. A., Title 28, § 288; id. U. S. C.

Rules of Court of Claims.

Application for transcript of record, Rule 99.

NOTES TO DECISIONS

In General.

Procedure in suits under 11 F. C. A., Title 38, § 445; U. S. C. A., Title 38, § 445; id. U. S. C. is the same as that provided in Title 28, §§ 761-765. *Whitney v. United States* (C. C. A. 9), 8 Fed. (2d) 476; *Munro v. United States* (D. C.-N. Y.), 10 Fed. Supp. 412. Revd. on other grounds 89 Fed. (2d) 614. Affd. 303 U. S. 36, 82 L. ed. 633, 58 Sup. Ct. 421; *Miller v. United States* (D. C.-N. Y.), 13 Fed. Supp. 684; *Spencer v. United States* (D. C.-Mass.), 14 Fed. Supp. 46.

Sufficiency of Findings and Conclusions in Lower Court.

Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, the Appellate Court can see enough on a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. ed. 669,

6 Sup. Ct. 421; *United States v. Tinsley* (C. C. A. 4), 68 Fed. 433.

On certiorari in patent infringement case, the findings of fact must decide questions of validity and infringement and include circumstantial facts sufficient to warrant court's conclusion, and may not be aided by statements in the conclusions of law or opinion of the court to effect that patent is valid and infringed. *United States v. Esnault-Pelterie*, 299 U. S. 201, 81 L. ed. 123, 57 Sup. Ct. 159, vacating judgment in 81 Ct. Cls. 785.

Where finding of court of claims, pleadings, and opinion of court taken together clearly show that statute under consideration was not complied with case will not be remanded to Court of Claims to allow it to supplement and clarify its finding, and take additional evidence to that end. *American Propeller & Mfg. Co. v. United States*, 300 U. S. 475, 81 L. ed. 751, 57 Sup. Ct. 521, revg. 83 Ct. Cls. 100, 14 Fed. Supp. 168, 17 Fed. Supp. 215.

Finding should be examined in the light of the pleadings. *American Propeller & Mfg. Co. v. United States*, 300 U. S. 475, 81 L. ed. 751, 57 Sup. Ct. 521, revg. 83 Ct. Cls. 100, 14 Fed. Supp. 168, 17 Fed. Supp. 215.

Informality of an opinion, findings, and conclusions did not require a reversal. *Atkinson v. United States* (C. C. A. 8), 73 Fed. (2d) 214, affg. 4 Fed. Supp. 398.

In action for refund of income tax payments, the findings of fact and conclusions of law may be considered as an opinion of the court. *United States v.*

First Wisconsin Trust Co. (C. C. A. 7), 92 Fed. (2d) 840.

Sufficiency of Record.

Only such statement of facts should be brought to Supreme Court as may be necessary to enable it to decide upon correctness of propositions of law ruled by Court of Claims. *De Groot v. United States*, 5 Wall. (72 U. S.) 419, 18 L. ed. 700.

On writ of certiorari, the record is required to include the pleadings, finding of facts, and the judgment. The opinion, if any, is also included. The findings are required to be in the nature of a special verdict and specifically set forth the ultimate facts; the evidence is not brought up. *United States v. Esnault-Pelterie*, 299 U. S. 201, 81 L. ed. 123, 57 Sup. Ct. 159, vacating judgment in 81 Ct. Cls. 785.

It is sufficient if the record presents understandingly the questions of law involved. *United State v. Swift* (C. C. A. 1), 139 Fed. 225.

The purpose of the opinion is to enable the public and the Appellate Court to find on the record a formal statement of the findings of the trial court, both on questions of law and fact, and the reasons for such findings. *Hyams v. United States* (C. C.-Mass.), 139 Fed. 997. Affd. 146 Fed. 15.

Opinion and findings of fact required by Supreme Court Rule 38 may be included in single document. *P. H. & F. M. Roots Co. v. United States* (C. C. A. 7), 17 Fed. (2d) 337.

PART FOUR

ADMINISTRATIVE AGENCIES

CHAPTER 26

UNITED STATES BOARD OF TAX APPEALS

Form	Form
915. Petition for redetermination of tax deficiency.	920. Petition for review and assignments of error.
916. Answer by Commissioner of Internal Revenue.	921. Notice of filing petition for review.
917. Judgment of Board of Tax Appeals.	922. Petition by taxpayer for review of decision of Board of Tax Appeals.
918. Motion to reconsider board's decision.	923. Precipe.
919. Order denying motion for reconsideration.	924. Judgment.
	925. Order allowing certiorari.

INTRODUCTION.—The Board of Tax Appeals was created by the Revenue Act of 1924 (act approved, June 2, 1924, 43 Stat. 253), and continued by the Revenue Act of 1926 (act approved, Feb. 26, 1926, 44 Stat. 9).

Its function is to redetermine deficiencies determined by the Commissioner of Internal Revenue, in income, profits, estate, and gift taxes.

Decisions are subject to review by the United States Circuit Court of Appeals for the appropriate circuit, or by the United States Court of Appeals for the District of Columbia, and thereafter by the Supreme Court of the United States upon certiorari.

915. Petition for Redetermination of Tax Deficiency.

United States Board of Tax Appeals
Docket No. _____

_____,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

PETITION

Filed ———, 19—.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, dated ———, 19—, and as a basis for this proceeding alleges as follows:

1. The petitioner is a citizen of the United States of America and resides at —, in the borough of —, county of —, state of —.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the taxpayer on — —, 19—.

3. The taxes in controversy are income taxes for the calendar year 19—, for which year no tax was assessed against petitioner and for which an alleged deficiency of — dollars (\$—) is claimed by the treasury department.

4. The determination of tax set forth in said notice of deficiency is based upon the following error, to wit, that the statement annexed to said notice of deficiency alleges that

"From information furnished by the internal revenue agent in charge at Newark, New Jersey, it appears that you received salary of \$8,137.50 from The Port of New York Authority which was not included as taxable income.

"Since it appears that this amount is not exempt from Federal income tax your income has been increased by \$8,137.50."

5. The facts upon which the petitioner relies as a basis for this petition are as follows:

(a) The Port of — Authority was, during the period of petitioner's employment therewith including the entire calendar year 19—, and now is, a political subdivision and governmental instrumentality of the states of — and —.

(b) The Port of — Authority was, during said period, and is now engaged in proper and essential governmental functions of the states of — and — in the construction, maintenance, and operation of highway bridges and tunnels and the Inland Terminal hereinafter referred to, which it was directed to build by the states of — and — in partial effectuation of a comprehensive plan for the development of the Port of — adopted by the said states.

(c) The petitioner was and has been regularly employed by the said the Port of — Authority since —, 19—, through and including the entire calendar year 19—, down to the date of this petition, receiving an annual compensation therefor, payable twice monthly throughout said period.

(d) The duties of said employment, at all times hereinbefore mentioned, consisted in the performance of all tasks as might from time to time be assigned to petitioner by the general manager of the Port of — Authority in connection with the construction, operation, and maintenance by the said the Port of — Authority of a certain Inland Terminal Building, located in the block bounded by — and — Avenues, — and — Streets, in the borough of —, city of —, county of —, and state of —, known as "Inland Terminal No. 1," and in connection with other projects and works of the aforesaid the Port of — Authority.

(e) The duties of said employment, at all times herein mentioned, consisted in the rendition of prescribed services and not the accomplishment

of specific objects and the services of the petitioner were continuous and not occasional or temporary.

(f) The petitioner at all times herein mentioned was an employee of the Port of — Authority aforesaid and not an independent contractor.

6. Wherefore, the petitioner prays that the board may hear this proceeding and may determine that the salary received by the petitioner as an employee of the Port of — Authority during the year 19— was not taxable and that the reported deficiency in the sum of — dollars (\$—) is erroneous and that the notice thereof and the assessment of any tax thereon be set aside.

Dated —, — —, 19—.

Attorney for petitioner,
— Avenue,
_____, —.

(Verification.)

Source of Form.

From record in *Helvering v. Gerhardt*, 304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct. 969.

Statutory References.

Board to prescribe rules of practice and procedure, 6 F. C. A., Title 26, §§ 611, 1111; U. S. C. A., Title 26, §§ 611, 1111; id. U. S. C.

Jurisdiction, 6 F. C. A., Title 26, §§ 601, 1101; U. S. C. A., Title 26, §§ 601, 1101; id. U. S. C.

Petition to redetermine estate tax deficiency, time for filing, stay of proceedings, 6 F. C. A., Title 26, §§ 471, 511, 871; U. S. C. A., Title 26, §§ 471, 511, 871; id. U. S. C.

Petition to redetermine gift tax deficiency, time for filing, stay of proceedings, 6 F. C. A., Title 26, §§ 562, 577, 1012, 1027; U. S. C. A., Title 26, §§ 562, 577, 1012, 1027; id. U. S. C.

Petition to redetermine income tax deficiency, time for filing, stay of collection of tax, and exception thereto. 6 F. C. A., Title 26, §§ 272, 322; U. S. C. A., Title 26, §§ 272, 322; id. U. S. C.

Service of process, 6 F. C. A., Title 26, §§ 613, 1113; U. S. C. A., Title 26, §§ 613, 1113; id. U. S. C.

Rules of Board of Tax Appeals.

Amended or supplemental petition, Rule 17.

Better pleading may be required, allegations not denied deemed to be admitted, Rule 18.

Form and requirements of papers and pleadings before board, Rule 4.

Form, requirements and essential allegations of petitions, Rule 6.

Designation of parties, Rule 5.

Nature, form, and allegations of reply, Rule 15.

Service of process on commissioner, Rule 12.

NOTES TO DECISIONS

In General.

Taxpayer is not limited to presenting matters which he had previously submitted to the commissioner, and he is entitled to amend his petition to conform to the proof. *International Banding Mach. Co. v. Com. Int. Rev.* (C. C. A. 2), 37 Fed. (2d) 660.

Petition for redetermination of deficiency assessed against petitioner for not

withholding taxes on compensation paid by it to nonresident aliens for years 1927 to 1933 was the petition of a "taxpayer" and was within jurisdiction of board. *Houston Street Corp. v. Com. Int. Rev.* (C. C. A. 5), 84 Fed. (2d) 821.

Letter of taxpayer received by board within 60-day period was sufficient to constitute a petition and redetermination of the board based thereon was conclusive

on the parties. *Continental Petroleum Co. v. United States* (C. C. A. 10), 87 Fed. (2d) 91.

A paper addressed to the commissioner requesting the consideration of certain facts without indicating an intention to appeal can not be considered on appeal and can not be amended. *M. T. K. Products Co. v. Com. Int. Rev.*, 1 B. T. A. 924.

Petition must set forth basis of the claim of error in the commissioner's determination and the facts which establish the case of the taxpayer. *Martin Band Instrument Co. v. Com. Int. Rev.*, 2 B. T. A. 963.

Questions discussed orally but not pleaded in the original petition or raised by proper amendment will not be considered. *H. D. & J. K. Crosswell, Inc. v. Com. Int. Rev.*, 6 B. T. A. 1315.

Allegations of petition and stipulation did not confer jurisdiction where notice of commissioner does not show a deficiency. *Blackstone v. Com. Int. Rev.*, 12 B. T. A. 456.

Jurisdiction of the board must appear from the taxpayer's petition. *Consolidated Companies, Inc. v. Com. Int. Rev.*, 15 B. T. A. 645.

A petition which was signed and verified by an unauthorized person can not be amended after the statutory period has expired. *Powers v. Com. Int. Rev.*, 20 B. T. A. 753.

The specific constitutional provision alleged to be violated must be pleaded. *Coca-Cola Bottling Co. v. Com. Int. Rev.*, 22 B. T. A. 686.

Petition signed by attorney of record of taxpayer, and verified by an officer of another corporation owning all of its capital stock was sufficient. *Gibson Amusement Co. v. Com. Int. Rev.*, 22 B. T. A. 1212; *Monitor Amusement Co. v. Com. Int. Rev.*, 22 B. T. A. 1214.

Matters not pleaded in original or amended petition will be disregarded. *Coosa Land Co. v. Com. Int. Rev.*, 29 B. T. A. 389.

Telegram sent to board less than 90 days after notice of deficiency, reading "File this as tentative petition," was insufficient to give board jurisdiction. *Rosenberg v. Com. Int. Rev.*, 32 B. T. A. 618.

Estate Taxes.

Statement of claim held demurrable for failure to state facts constituting cause of action. *United States v. Rodenbough* (D. C.-Pa.), 14 Fed. (2d) 989.

Issues.

New issue held presentable with consent of board, at any time before case was disposed of. *Excelsior Motor Mfg. & Supply Co. v. Com. Int. Rev.* (C. C. A. 7), 43 Fed. (2d) 968, revg. 5 B. T. A. 582.

Board may consider claim for deduction not urged in return or before commissioner. *Gutterman Strauss Co. v. Com. Int. Rev.*, 1 B. T. A. 243.

Issue not raised by the pleadings will be disregarded. *Great Bear Spring Co. v. Com. Int. Rev.*, 12 B. T. A. 383.

Petition dismissed for failure to comply with Rule 5 (g) as to verification. *Powers v. Com. Int. Rev.*, 20 B. T. A. 753.

Joinder.

Three separate entities can not be joined as a single petitioner in one verified petition. *Anderson Steam Vulcanizer Co. v. Com. Int. Rev.*, 6 B. T. A. 737.

Single petition by two corporations, one of which was successor of the other, held to confer jurisdiction. *Lang Body Co. v. Com. Int. Rev.*, 16 B. T. A. 728.

Petition held to be one by individual partners and not by the firm, and was sufficient to support an amendment to permit the individual partners to file separate individual petitions. *Bankers Realty Syndicate v. Com. Int. Rev.*, 20 B. T. A. 612.

A joint petition is not authorized, and each petitioner will be required to file a separate petition and will be granted time in which that may be done. *Held v. Com. Int. Rev.*, 20 B. T. A. 863; *Sparrow v. Com. Int. Rev.*, 20 B. T. A. 865.

Reply.

Reply under Rule 15 is for defensive purposes only and can not be used to raise new issues in which affirmative relief is sought. *Central Nat. Bank v. Com. Int. Rev.*, 29 B. T. A. 530.

916. Answer by Commissioner of Internal Revenue.

(Title.)

The Commissioner of Internal Revenue, by his attorney —, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed in the above-entitled case, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies that the respondent erred in the manner alleged in paragraph 4 of the petition.
5. Denies the allegations of fact contained in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

Assistant general counsel for the
Bureau of Internal Revenue.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup.
Ct. 969.

Cross-Reference.

In connection with Forms 916 to 918,
see notes to Form 915.

Rules of Board of Tax Appeals.

Form, requirements, allegations of an-
swer, or other motion; time for filing,
Rule 14.

NOTES TO DECISIONS**In General.**

Answer of commissioner was insuffi-
cient under rules of board. Cascade

Milling & Elev. Co. v. Com. Int. Rev., 25
B. T. A. 946.

917. Judgment of Board of Tax Appeals.

(Title.)

In accordance with the board's report, promulgated — —, 19—,
it is

Ordered, adjudged, and decided, that there is no deficiency in income
tax for 19—.

Enter:

(Entered — —, 19—.)

Member.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup.
Ct. 969.

Statutory References.

Effect of decision dismissing petition,
6 F. C. A., Title 26, §§ 617 (d), 1117 (d);
U. S. C. A., Title 26, §§ 617 (d), 1117 (d);
id. U. S. C.

Effect of decision that tax is barred by limitations, 6 F. C. A., Title 26, §§ 617 (e), 1117 (e); U. S. C. A., Title 26, §§ 617 (e), 1117 (e); id. U. S. C.

Effect of report of division, 6 F. C. A., Title 26, §§ 618, 1118; U. S. C. A., Title 26, §§ 618, 1118; id. U. S. C.

Report and decision, findings of fact required, 6 F. C. A., Title 26, §§ 617, 1117; U. S. C. A., Title 26, §§ 617, 1117; id. U. S. C.

When decision of board becomes final, appeal to Circuit Court of Appeals or Supreme Court, 6 F. C. A., Title 26, §§ 640, 1140; U. S. C. A., Title 26, §§ 640, 1140; id. U. S. C.

Rules of Board of Tax Appeals.

Submitting computation of amounts due, Rule 50.

NOTES TO DECISIONS

In General.

The effective scope of a decision by the board is no broader than the issue, opinion, and findings. *Gulf States Steel Co. v. United States*, 287 U. S. 32, 77 L. ed. 150, 53 Sup. Ct. 69, affg. (C. C. A. 5), 56 Fed. (2d) 43.

The board is required to make such findings of facts as are necessary to a determination of liability. *Kendrick Coal & Dock Co. v. Com. Int. Rev.* (C. C. A. 8), 29 Fed. (2d) 559.

It is improper for the board to make findings of fact inconsistent with a stipulation of the facts. *Iowa Bridge Co. v. Com. Int. Rev.* (C. C. A. 8), 39 Fed. (2d) 777, revg. 14 B. T. A. 1048.

"Findings of fact" found in the "opinion" part of the report are to be considered. *Com. Int. Rev. v. Crescent Leather Co.* (C. C. A. 1), 40 Fed. (2d) 833.

Order of board failing to state representative capacity in which petitioner sought review was not invalid, it being a mere clerical error. *Smith v. Com. Int. Rev.* (C. C. A. 4), 67 Fed. (2d) 167, dismg. app. 26 B. T. A. 778.

A written opinion may perform the office of a finding of facts. *Olson v. Com. Int. Rev.* (C. C. A. 7), 67 Fed. (2d) 726, affg. 24 B. T. A. 702. Cert. den. 292 U. S. 637, 78 L. ed. 1489, 54 Sup. Ct. 716.

Where evidence is not contradicted, the board is not required to make findings of fact. *West v. Com. Int. Rev.* (C. C. A. 3), 68 Fed. (2d) 246, reviewing 22 B. T. A. 595.

The board's finding that expense incurred by taxpayer in moving residence from one lot to another constituted a capital expense rather than an ordinary business expense is the finding of an ultimate fact involved in the determination of taxpayer's income, and will not be interfered with by the Appellate Court

where the transcript did not contain the evidence. *Winnett v. Helvering* (C. C. A. 9), 68 Fed. (2d) 614.

Board is given the option to make its report in the form of special findings, an opinion, or a memorandum opinion. *Emerald Oil Co. v. Com. Int. Rev.* (C. C. A. 10), 72 Fed. (2d) 681.

Finding of fact may be included in board's opinion, without being supported by formal finding of fact. *Flynn v. Com. Int. Rev.* (C. C. A. 5), 77 Fed. (2d) 180, affg. 28 B. T. A. 578.

Board must find ultimate facts. *Doernbecher Mfg. Co. v. Com. Int. Rev.* (C. C. A. 9), 80 Fed. (2d) 573, modg. 30 B. T. A. 973.

No decision will be made on an item not in issue under pleadings. *Wayburn v. Com. Int. Rev.*, 32 B. T. A. 813.

Dismissal of Petition.

The board is held to have rendered a decision within the meaning of the Revenue Act of 1926 which would prevent any subsequent action in the courts when, in dismissing the appeal upon taxpayer's motion, it stated that it was unable from the pleadings to determine the amount of the deficiency. *Warren Mfg. Co. v. Tait* (D. C.-Md.), 60 Fed. (2d) 982.

Question of whether or not a corporation owed a tax was foreclosed when its appeal to the board was dismissed. *Ohio Locomotive Crane Co. v. Denman* (C. C. A. 6), 73 Fed. (2d) 408. Cert. den. 294 U. S. 712, 79 L. ed. 1246, 55 Sup. Ct. 508.

Where there is no evidence to support petitioner's allegations, the appeal must be dismissed under provisions of section 906 (c) of the Revenue Act 1924, as amended by section 1000 of the Revenue Act of 1926. *Pennock v. Com. Int. Rev.*, 4 B. T. A. 1271.

Order dismissing petition to board for redetermination of deficiencies is a decision by the board that the correct amounts of the deficiencies were the amounts determined by the commissioner. *St. Petersburg Land & Loan Co. v. Com. Int. Rev.*, 26 B. T. A. 530.

Tax Barred.

A finding of the board that "there is no deficiency for the year 1917, because the statute of limitations has run against collection," did not abate the deficiency

assessment within the meaning of a bond given to stay collection, which bond required the obligors to pay so much of the amount as is not abated. *Gulf States Steel Co. v. United States*, 287 U. S. 32, 77 L. ed. 150, 53 Sup. Ct. 69, affg. (C. C. A. 5), 56 Fed. (2d) 43.

Final judgment of board holding that taxpayer's liability for a certain year was barred, was conclusive in the District Court. *Pioneer Rubber Mills v. United States (D. C.-Cal.)*, 10 Fed. Supp. 317.

918. Motion to Reconsider Board's Decision.

(Title.)

Now comes the respondent, by his attorney, —, General Counsel for the department of the treasury, and moves that the board reconsider its opinion and decision heretofore rendered herein, and that the board vacate said opinion and decision, or modify the same to conform to the facts of record, and in support of said motion shows:

(1) That under date of — —, 19—, the respondent filed his motion herein to amend the findings of fact, setting forth wherein the board's findings of fact were incomplete and inadequate and failed to find numerous facts which were pertinent and germane to the issues herein if not controlling thereof, and requesting the board to make specific findings of fact as to numerous facts of record.

(2) That upon the basis of said amended and specific findings of fact requested by respondent, the opinion and conclusions of the board are clearly inconsistent and not in accordance with the facts stipulated by the parties or proved by competent testimony.

(3) That upon the basis of said amended and specific findings of fact requested by respondent the opinion of the board and the conclusions reached therein are clearly erroneous both in fact and in law, and are inconsistent with the decisions of the Supreme Court of the United States in the cases of *Helvering v. Powers* (1935) 293 U. S. 214; *Flint v. Stone Tracy Company* (1908) 220 U. S. 107; *Trenton v. New Jersey* (1916) 262 U. S. 182; *California v. United States* (1936) 297 U. S. 1.

* * *

(4) That the authority of Congress over those fields of commerce is supreme and plenary, empowering congress to license, regulate, and control the usage of such instrumentalities without judicial review by any court.

(5) That the authority of congress over those fields of commerce is exclusive and is not shared with any of the states. *United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53. Hence, the construction and operation of such instrumentalities which could only be undertaken with the consent of congress can not be held to be an

exercise of the powers of another sovereign, to wit, the state of — or —. Hence, the exercise of those functions by the several states is purely permissive and is not sovereign nor governmental in any sense.

Wherefore, respondent prays that this motion be granted.

General counsel for the department of the treasury.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct.
969.

NOTES TO DECISIONS

In General.

General motion to reopen which stated no specific evidence to be offered and no additional facts to be proved was properly denied. *Fritz v. Com. Int. Rev.* (C.

C. A. 5), 76 Fed. (2d) 460, aff'g 28 B. T. A. 408.

Motion to set aside final order and to grant a rehearing was defective. *Selwyn Operating Corp. v. Com. Int. Rev.*, 11 B. T. A. 593.

919. Order Denying Motion for Reconsideration.

(Title.)

In the respondent's "motion for reconsideration," filed — —, 19—, to which the petitioners filed opposition on — —, 19—, there is nothing which has not heretofore been fully submitted to the board and considered by it in reaching its decision. Although the board's opinion was deliberately made brief, it nevertheless disposes of all of the arguments presented in either the original submission or the present motion.

The motion is denied.

Date—

Member.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct.
969.

Cross-Reference.

See notes to Forms 915, 918.

920. Petition for Review and Assignments of Error.

In the United States Circuit Court of Appeals
for the — Circuit.

B. T. A. Docket No. —

Commissioner of Internal Revenue,

Petitioner on Review,

v.

Respondent on Review.

To the Honorable Judges of the United States Circuit Court of Appeals
for the — Circuit:

Now comes —, Commissioner of Internal Revenue, by his attorneys, —, Assistant Attorney-General, —, Chief Counsel, bureau of internal revenue, and —, Special Attorney, bureau of internal revenue, and respectfully shows:

I

Your petitioner on review, hereinafter referred to as the "Commissioner," is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States. Your respondent on review hereinafter referred to as the "Taxpayer," is an individual and an inhabitant of the city of —, state of —, and filed his income tax return for the year in question with the Collector of Internal Revenue for the — District of —, whose office is located in the city of —, —, and within the — judicial circuit.

II

The Commissioner determined a deficiency in federal income taxes against the taxpayer for the calendar year 19— in the amount of — dollars (\$—), and on — —, 19—, in accordance with the provisions of section 272 of the Revenue Act of 1932, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on — —, 19—, the taxpayer filed an appeal from said notice of deficiency to the United States Board of Tax Appeals, being Docket No. —. Said appeal was consolidated for hearing and decision with the appeals of four other taxpayers whose appeals were presented simultaneously to the board.

On — —, 19—, the Board of Tax Appeals promulgated its opinion, and on — —, 19—, entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that there was no deficiency in tax against the taxpayer for said year. The opinion of the Board of Tax Appeals is reported at — B. T. A. —.

On — —, 19—, the Commissioner filed a motion for amended and specific findings of fact setting forth in detail and in particular wherein the Board of Tax Appeals had failed to make correct and adequate findings of material facts based upon the stipulation of facts and upon other evidence of record. On — —, 19—, the Commissioner filed a motion for reconsideration of the cases based upon said amended and specific findings of fact. Both of said motions of the Commissioner were denied by the board on — —, 19—.

The nature of the controversy is as follows: * * *

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the board manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings,

decision, and final order of redetermination so entered by the board, to wit: [Here insert].

The board erred in failing to find for the Commissioner upon all the facts of record.

Wherefore, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the — Circuit, that a transcript of the record be transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

Assistant attorney-general.

Chief counsel,
Bureau of Internal Revenue.

Special attorney,
Bureau of Internal Revenue.

[JURAT.]

Source of Form.

From record in *Helvering v. Gerhardt*, 304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct. 969.

Cross-Reference.

See notes to Forms 915, 917.

Statutory References.

See rules of Circuit Court of Appeals for appropriate circuit, 8 F. C. A., pp. 602-708.

Courts of review, jurisdiction, powers, 6 F. C. A., Title 26, §§ 641, 1141; U. S. C. A., Title 26, §§ 641, 1141; *id.* U. S. C. Petition for review, 6 F. C. A., Title 26, §§ 642, 1142; U. S. C. A., Title 26, §§ 642, 1142; *id.* U. S. C.

NOTES TO DECISIONS

In General.

The court can not review finding of fact where petitions for review do not set forth the evidence. *Commissioner of Int. Rev. v. Crescent Leather Co.* (C. C. A. 1), 40 Fed. (2d) 833.

Special findings of the board can not be reviewed where the evidence is not returned with the record. *Cogar v. Com. Int. Rev.* (C. C. A. 6), 44 Fed. (2d) 554. *Reh. den.* 51 Fed. (2d) 501; *Liberty Nat. Co. v. Com. Int. Rev.* (C. C. A. 10), 58 Fed. (2d) 57, *revg.* 18 B. T. A. 510. *Cert. den.* 287 U. S. 603, 77 L. ed. 525, 53 Sup. Ct. 9.

The court on appeal may look to the opinion of the board as well as to the findings to ascertain what was decided by the board. *California Iron Yards*

Co. v. Com. Int. Rev. (C. C. A. 9), 47 Fed. (2d) 514, *affg.* 15 B. T. A. 25.

A paper contained in the record which was not introduced in the evidence will be stricken out. *Griffiths v. Com. Int. Rev.* (C. C. A. 7), 50 Fed. (2d) 782.

Papers called to the attention of the board are not reviewable by Circuit Court of Appeals unless made a part of the record. *Heinz v. Com. Int. Rev.* (C. C. A. 5), 70 Fed. (2d) 461, *affg.* 28 B. T. A. 276.

Board's decision will not be disturbed because of a question not disclosed in the record or included in the specifications of errors. *Helvering v. Ackerman* (C. C. A. 9), 71 Fed. (2d) 586, *affg.* 24 B. T. A. 512.

Matters not in the record will not be considered as before the Circuit Court

of Appeals. *Hartley v. Com. Int. Rev.* (C. C. A. 8), 72 Fed. (2d) 352, modg. 27 B. T. A. 952. Affd. 295 U. S. 216, 79 L. ed. 1399, 55 Sup. Ct. 756.

Board's denial of petition for rehearing was not reviewable in absence of the motion from the record. *Emerald Oil Co. v. Com. Int. Rev.* (C. C. A. 10), 72 Fed. (2d) 681.

The board and the Circuit Court of Appeals in reviewing an order of re-determination are confined to the facts set out in the record. *Whitney v. Com. Int. Rev.* (C. C. A. 3), 73 Fed. (2d) 589.

Where petition for rehearing did not point out wherein the record before the court was not as complete as the record before the board, a diminution of the record could not be granted. *Commissioner of Int. Rev. v. Erickson* (C. C. A. 1), 74 Fed. (2d) 327, revg. 26 B. T. A. 831. Cert. den. 294 U. S. 730, 79 L. ed. 1260, 55 Sup. Ct. 639.

Assignments of Errors.

Assignment of error in petition for review raised question whether a sum of money received was capital or income. *Thompson v. Com. Int. Rev.* (C. C. A. 3), 28 Fed. (2d) 247.

Assignment of error, in appeal by commissioner, was too general to present anything for review. *Commissioner of Int. Rev. v. John C. Moore Corp.* (C. C.

A. 2), 42 Fed. (2d) 186, affg. 15 B. T. A. 1140.

Assignment of error general in character was sufficient to warrant review. *Burnet v. San Joaquin, Fruit & Inv. Co.* (C. C. A. 9), 52 Fed. (2d) 123, rev'g. 16 B. T. A. 1290.

Board's decision will not be disturbed because of a question not disclosed in the record or included in the specifications of error. *Helvering v. Ackerman* (C. C. A. 9), 71 Fed. (2d) 586, affg. 24 B. T. A. 512; *Helvering v. Harris* (C. C. A. 9), 71 Fed. (2d) 590.

In absence of necessary evidence, assignment can not be considered. *Helvering v. Hampton* (C. C. A. 9), 79 Fed. (2d) 358.

Court reviewing whether transaction constituted a corporate reorganization had jurisdiction to determine whether stock exchanges were distinct or parts of one consolidated transaction though holding of the board that they were distinct exchanges was not assigned as error. *Starr v. Com. Int. Rev.* (C. C. A. 4), 82 Fed. (2d) 964, revg. 31 B. T. A. 671. Cert. den. 298 U. S. 680, 80 L. ed. 1401, 56 Sup. Ct. 948.

Contention not assigned as error could not be considered on appeal. *Pfeiffer v. Com. Int. Rev.* (C. C. A. 2), 88 Fed. (2d) 3.

921. Notice of Filing Petition for Review.

(Title.)

To: Mr. _____,
_____ Avenue, _____, _____.

Mr. _____,
_____ Avenue, _____, _____.

You are hereby notified that the Commissioner of Internal Revenue did on the _____ day of _____, 19____, file with the clerk of the United States Board of Tax Appeals, at _____, _____, a petition for review by the United States Circuit Court of Appeals for the _____ Circuit, of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this _____ day of _____, 19____.

Chief counsel,
Bureau of Internal Revenue.

decision, and final order of redetermination so entered by the board, to wit: [Here insert].

The board erred in failing to find for the Commissioner upon all the facts of record.

Wherefore, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the — Circuit, that a transcript of the record be transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

Assistant attorney-general.

Chief counsel,
Bureau of Internal Revenue.

Special attorney,
Bureau of Internal Revenue.

[JURAT.]

Source of Form.

From record in *Helvering v. Gerhardt*, 304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct. 969.

Cross-Reference.

See notes to Forms 915, 917.

Statutory References.

See rules of Circuit Court of Appeals for appropriate circuit, 8 F. C. A., pp. 602-708.

Courts of review, jurisdiction, powers, 6 F. C. A., Title 26, §§ 641, 1141; U. S. C. A., Title 26, §§ 641, 1141; id. U. S. C. Petition for review, 6 F. C. A., Title 26, §§ 642, 1142; U. S. C. A., Title 26, §§ 642, 1142; id. U. S. C.

NOTES TO DECISIONS

In General.

The court can not review finding of fact where petitions for review do not set forth the evidence. Commissioner of Int. Rev. v. Crescent Leather Co. (C. C. A. 1), 40 Fed. (2d) 833.

Special findings of the board can not be reviewed where the evidence is not returned with the record. *Cogar v. Com. Int. Rev.* (C. C. A. 6), 44 Fed. (2d) 554. *Reh. den.* 51 Fed. (2d) 501; *Liberty Nat. Co. v. Com. Int. Rev.* (C. C. A. 10), 58 Fed. (2d) 57, revg. 18 B. T. A. 510. *Cert. den.* 287 U. S. 603, 77 L. ed. 525, 53 Sup. Ct. 9.

The court on appeal may look to the opinion of the board as well as to the findings to ascertain what was decided by the board. *California Iron Yards*

Co. v. Com. Int. Rev. (C. C. A. 9), 47 Fed. (2d) 514, affg. 15 B. T. A. 25.

A paper contained in the record which was not introduced in the evidence will be stricken out. *Griffiths v. Com. Int. Rev.* (C. C. A. 7), 50 Fed. (2d) 782.

Papers called to the attention of the board are not reviewable by Circuit Court of Appeals unless made a part of the record. *Heinz v. Com. Int. Rev.* (C. C. A. 5), 70 Fed. (2d) 461, affg. 28 B. T. A. 276.

Board's decision will not be disturbed because of a question not disclosed in the record or included in the specifications of errors. *Helvering v. Ackerman* (C. C. A. 9), 71 Fed. (2d) 586, affg. 24 B. T. A. 512.

Matters not in the record will not be considered as before the Circuit Court

of Appeals. *Hartley v. Com. Int. Rev.* (C. C. A. 8), 72 Fed. (2d) 352, modg. 27 B. T. A. 952. Affd. 295 U. S. 216, 79 L. ed. 1399, 55 Sup. Ct. 756.

Board's denial of petition for rehearing was not reviewable in absence of the motion from the record. *Emerald Oil Co. v. Com. Int. Rev.* (C. C. A. 10), 72 Fed. (2d) 681.

The board and the Circuit Court of Appeals in reviewing an order of retermination are confined to the facts set out in the record. *Whitney v. Com. Int. Rev.* (C. C. A. 3), 73 Fed. (2d) 589.

Where petition for rehearing did not point out wherein the record before the court was not as complete as the record before the board, a diminution of the record could not be granted. *Commissioner of Int. Rev. v. Erickson* (C. C. A. 1), 74 Fed. (2d) 327, revg. 26 B. T. A. 831. Cert. den. 294 U. S. 730, 79 L. ed. 1260, 55 Sup. Ct. 639.

Assignments of Errors.

Assignment of error in petition for review raised question whether a sum of money received was capital or income. *Thompson v. Com. Int. Rev.* (C. C. A. 3), 28 Fed. (2d) 247.

Assignment of error, in appeal by commissioner, was too general to present anything for review. *Commissioner of Int. Rev. v. John C. Moore Corp.* (C. C.

A. 2), 42 Fed. (2d) 186, affg. 15 B. T. A. 1140.

Assignment of error general in character was sufficient to warrant review. *Burnet v. San Joaquin, Fruit & Inv. Co.* (C. C. A. 9), 52 Fed. (2d) 123, rev'g. 16 B. T. A. 1290.

Board's decision will not be disturbed because of a question not disclosed in the record or included in the specifications of error. *Helvering v. Ackerman* (C. C. A. 9), 71 Fed. (2d) 586, affg. 24 B. T. A. 512; *Helvering v. Harris* (C. C. A. 9), 71 Fed. (2d) 590.

In absence of necessary evidence, assignment can not be considered. *Helvering v. Hampton* (C. C. A. 9), 79 Fed. (2d) 358.

Court reviewing whether transaction constituted a corporate reorganization had jurisdiction to determine whether stock exchanges were distinct or parts of one consolidated transaction though holding of the board that they were distinct exchanges was not assigned as error. *Starr v. Com. Int. Rev.* (C. C. A. 4), 82 Fed. (2d) 964, revg. 31 B. T. A. 671. Cert. den. 298 U. S. 680, 80 L. ed. 1401, 56 Sup. Ct. 948.

Contention not assigned as error could not be considered on appeal. *Pfeiffer v. Com. Int. Rev.* (C. C. A. 2), 88 Fed. (2d) 3.

921. Notice of Filing Petition for Review.

(Title.)

To: Mr. _____,
_____ Avenue, _____, _____.

Mr. _____,
_____ Avenue, _____, _____.

You are hereby notified that the Commissioner of Internal Revenue did on the _____ day of _____, 19____, file with the clerk of the United States Board of Tax Appeals, at _____, _____, a petition for review by the United States Circuit Court of Appeals for the _____ Circuit, of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this _____ day of _____, 19____.

Chief counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this — day of —, 19—.

Respondent on review.

Attorney for respondent on review.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct.
969.

Cross-Reference.

In connection with Forms 921 to 924,
see notes to Form 920.

922. Petition by Taxpayer for Review of Decision of Board of Tax Appeals.

(Title.)

To the Honorable Judges of the United States Circuit Court of Appeals for the — Circuit:

Now comes — Oil Corporation, a corporation, by —, its attorney, and respectively shows:

I

The petitioner, herein referred to as the taxpayer, is a resident of — County, in the state of —, and its address is — National Building, —, —.

The respondent is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, —, herein referred to as the "Commissioner."

The taxpayer filed an income tax return for the taxable year 19— with the Collector of Internal Revenue for the District of —, whose office is located within the — judicial circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income and excess profits taxes against the taxpayer for the year 19— in the amount of — dollars (\$—), and on — —, 19—, in accordance with the provisions of the applicable statute, sent to the taxpayer by registered mail a notice of said deficiency.

Within — days thereafter the taxpayer filed a petition for review from the said notice of deficiency with the United States Board of Tax Appeals. The case was in due course submitted to the board on a stipulation of facts for its finding and decision. On — —, 19—, the board promulgated its findings of fact and opinion in said proceeding, and on — —, 19—, entered a judgment and final order of redetermination wherein and whereby it ordered and decided that there

was a deficiency of — dollars (\$——) in the taxpayer's income tax for the year 19—, and a deficiency of — dollars (\$——) in its excess profits tax for said year.

III

The deficiencies in the taxpayer's income taxes and its excess profits taxes which were in controversy before the Board of Tax Appeals arose and resulted in part from the determination of the Commissioner that the sum of — dollars (\$——) which the taxpayer paid as its share of the intangible drilling and development costs of certain oil and gas wells of which it was part owner was not deductible from its gross income as ordinary business expense in determining its net income subject to taxation. The oil and gas wells for the intangible drilling costs of which the taxpayer paid said sum were drilled under what are known as turn-key job contracts, that is, under contracts let to a drilling contractor for a well completed and equipped ready for production. The Commissioner's contention in respect of such costs incurred under such contracts was that they were not deductible as ordinary business expense of the taxpayer. This, notwithstanding the taxpayer had consistently followed the practice of classifying such cost as ordinary business expense in previous years, and of claiming and taking the same as a deduction from its gross income.

In the finding, opinion, and final decision of the board above mentioned the Commissioner's contention is upheld, and the taxpayer is denied the deduction of said sum of intangible drilling cost paid for the drilling of wells under turn-key job contract from gross income. The taxpayer says that in this the Board of Tax Appeals committed error.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the board manifest error occurred and intervened to the prejudice of the petitioner, and its assigns and avers that the following errors and each of them, occurred in the said record, proceedings, decision, and final order of redetermination, and that upon these it relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

(1) The Board of Tax Appeals erred in holding that the sum of — dollars (\$——), paid by petitioner as its share of intangible drilling costs of certain oil and gas wells drilled under turn-key job contracts and of which it was part owner, was not deductible from petitioner's gross income as ordinary business expense.

(2) The Board of Tax Appeals erred in refusing to hold that the said sum of — dollars (\$——) mentioned in the preceding paragraph was ordinary business expense and as such deductible from petitioner's gross income in determining its net income subject to taxation.

(3) The Board of Tax Appeals erred in determining that there was a deficiency in the petitioner's income taxes for the year 19— in the sum of — dollars (\$—).

(4) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's excess profits tax for the year 19— in the sum of — dollars (\$—).

Wherefore, the petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the — Circuit; that a transcript be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing; and that appropriate action be taken by said court to the end that the errors complained of may be reviewed and corrected.

Attorney for petitioner.

STATE OF —, }
COUNTY OF —. } ss:

(Attorney for Petitioner), being first duly sworn, on his oath says that he is attorney of record for the petitioner named in the foregoing petition for review, and as such, is duly authorized to verify said petition; that he has read said petition and knows the contents thereof; and that the statement of facts therein are true.

Attorney for petitioner.

Subscribed and sworn to before me this — day of —, 19—.

Name.

Official character.

Source of Form.

From record in Rogers Oil & Gas Co.
v. Helvering, 305 U. S. 613, 83 L. ed.
391, 59 Sup. Ct. 72.

923. Precipe.

(Title.)

To the clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the — Circuit, copies duly certified as correct of the following documents and records in the above-entitled causes in connection with the petitions for review by the said Circuit Court of Appeals for the — Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the board.
2. Pleadings before the board:

(a) Petition, including annexed copy of deficiency letter, in each of the above cases.

(b) Answer in each of the above cases.

(c) Commissioner's motion to amend the findings of fact in the consolidated case.

(d) Commissioner's motion to reconsider the opinion and decision of the board and to vacate or modify the same to conform to the facts of record.

(e) Taxpayer's motion in opposition to amendment of findings of fact, including taxpayers' motion for additional findings of fact.

(f) Taxpayer's motion in opposition to commissioner's motion for a reconsideration.

3. Findings of fact, opinions and decisions of the board.

(a) Findings of fact and opinion promulgated — —, 19—.

(b) Judgment entered — —, 19—, in each of the above cases.

(c) Order denying motion to amend findings of fact.

(d) Order denying motion for reconsideration.

4. Petition for review and assignment of error, together with proof of service of notice of filing petition for review and of service of a copy of petition for review, in each of the above cases.

5. Statement of evidence as settled and allowed, including the stipulation of facts.

6. All exhibits filed in evidence including both those made a part of the stipulation of facts and those filed in evidence during the course of the hearing, are to be transmitted to the clerk of the Circuit Court of Appeals for the — Circuit in physical form.

7. Order extending the time for completion of the record and transmission thereof to the Circuit Court of Appeals for the — Circuit.

8. Stipulation of consolidation of causes on review, and for inclusion in record of but one statement of evidence.

9. This precipe.

Chief counsel, Bureau of Internal Revenue.

Service of a copy of the within proceeding is hereby admitted this — day of —, 19—.

Attorney for respondents.

924. Judgment.

(Title.)

Filed — —, 19—

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a mandate issue to the said board in accordance with this decree.

Clerk.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup.
Ct. 769.

925. Order Allowing Certiorari.

Supreme Court of the United States

_____, Commissioner of Internal
Revenue,

Petitioner.

v.

No. ____

_____,
Respondent.

Filed ____ —, 19—

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the ____ Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Source of Form.

From record in *Helvering v. Gerhardt*,
304 U. S. 405, 82 L. ed. 1427, 58 Sup.
Ct. 969.

Statutory Reference.

Certiorari to Supreme Court, power,
jurisdiction, 6 F. C. A., Title 26, §§ 641,
1141; U. S. C. A., Title 26, §§ 641, 1141;
id. U. S. C.

CHAPTER 27

INTERSTATE COMMERCE COMMISSION

Form

935. Order of Interstate Commerce Commission denying application of motor carrier.
936. Complaint to set aside order of Interstate Commerce Commission.
937. Answer to complaint to set aside order of Interstate Commerce Commission.

Form

938. Complaint to enjoin violations of Motor Carrier Act.
939. Answer to complaint to enjoin violations of Motor Carrier Act.
940. Complaint to set aside an order of Interstate Commerce Commission.
941. Answer of United States of America.

INTRODUCTION.—The Interstate Commerce Commission administers the Interstate Commerce Act, by which railroad companies, sleeping car companies, express companies, and pipe-line companies engaged in interstate or foreign commerce are subjected to the regulatory power of the commission in respect to rates, service, accounting, issuance of securities, and other similar matters. The Motor Carrier Act of 1935, approved August 9, 1935, extended the authority of the commission to motor carriers, i. e., bus lines and motor-truck companies, engaged in interstate or foreign commerce. The Act of September 18, 1940, extended it to carriers by water. The commission also has certain duties to perform in connection with proceedings affecting railroads under section 77 of the Bankruptcy Act.

935. Order of Interstate Commerce Commission Denying Application of Motor Carrier.

COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, that said application be, and it is hereby, denied, effective — — —, 19—.

And it is further ordered, that applicant be, and he is hereby, notified and required to cease and desist, on or before — — —, 19—, from all operation in interstate or foreign commerce as a common carrier of passenger and their baggage by motor vehicle.

By the commission, Division — — —.

[SEAL]

Secretary.

Source of Form.

From record in United States v. Maher, 307 U. S. 148, 83 L. ed. 1162, 59 Sup. Ct. 768.

Statutory Reference.

Jurisdiction and powers of Interstate Commerce Commission over motor carriers, 10A, F. C. A., Title 49, §§ 302, 304, 306; U. S. C. A., Title 49, §§ 302, 304, 306; id. U. S. C.

936. Complaint to Set Aside Order of Interstate Commerce Commission.

District Court of the United States

District of _____

_____, Interstate Busses,

Plaintiff,

v.

United States of America, and the
Interstate Commerce Commission,
Defendants.

No. _____

I

Jurisdiction of this court is invoked under the provisions of U. S. C., Title 28, sections 41 (28) and 43-48 inclusive, of said act.

II

Plaintiff is a common carrier by motor vehicle, engaged in interstate operations over United States Highway No. _____, between _____, _____, and _____, _____, and through various intermediate points, transporting passengers for the general public for compensation from each of the aforesaid cities to the other, and from various points within each of the states of _____ and _____, to points within other of said states, and in this respect plaintiff alleges that he was in bona fide operation as a common carrier by motor vehicle between said cities on _____, 19____, and that by reason of such operation plaintiff is, and was at all times herein mentioned entitled as a matter of right and law, under the provisions of section 206a of the Motor Carrier Act of 1935, known as the "Grandfather" clause thereof, to have issued to him by the defendant commerce commission, a certificate of public convenience and necessity, authorizing such operation, and that pending the issuance of said certificate, plaintiff is of right, and as provided in said certificate, entitled to continue his service.

III

Plaintiff, by application filed on or about the _____ day of _____, 19____, with said defendant commerce commission, sought a certificate of public convenience and necessity, authorizing plaintiff to operate as a common carrier by motor vehicle of passengers and their baggage over United States High-

way No. —, between —, —, and —, —, and intermediate points thereof.

IV

That thereafter the defendant commerce commission assigned said application for hearing before joint board No. —, and a hearing was had before said joint board No. — on the — day of —, 19—; that thereafter, and on the — day of —, 19—, the said joint board No. — returned to the defendant commerce commission, its report and recommended order to which, within — days from the date of service thereof, the said plaintiff served and filed his exceptions to said report and recommended order; that thereafter, and on the — day of —, 19—, the defendant commerce commission ordered that the application of said plaintiff for a certificate of public convenience and necessity be denied and made said order effective — —, 19—, and further ordered that said plaintiff cease and desist on or before the — day of —, 19—, from operations as a common carrier by motor vehicle of passengers and their baggage in interstate commerce from —, —, to —, —; that thereafter, and on the — day of —, 19—, said plaintiff filed with the defendant commerce commission his petition for a rehearing and reconsideration; that on the — day of —, 19—, the defendant commerce commission made and entered its order denying rehearing and reconsideration of the matters therein contained, but did make and enter an order extending the time for the plaintiff to cease and desist operations as a common carrier, from the — day of —, 19—, to the — day of —, 19—.

V

By his application filed with the defendant commerce commission, and by evidence adduced at the purported hearing before joint board No. —, it was shown that plaintiff was in bona fide operation as a common carrier by motor vehicles on — —, 19—, over the routes and within the territory for which application was made, and prior thereto; that there was no evidence before said defendant commerce commission to the contrary; that said purported order of the defendant commerce commission, requiring plaintiff to cease and desist operation on or before the — day of —, 19—, is without evidence to support it, and is contrary to the evidence, and in making and entering said purported order, the commerce commission exceeded its statutory powers and acted arbitrarily and unreasonably, and based said purported order on improper distinctions and considerations and interpretations of the Motor Carrier Act of 1935; that by reason of the premises plaintiff has been denied due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and will suffer great and irreparable injury in that plaintiff's business will be wholly lost and destroyed, and plaintiff's revenue from passengers who would otherwise travel by plaintiff's service will be irreparably lost and

plaintiff's investment in coaches, busses, offices, and other facilities made wholly unproductive; that plaintiff's employees will be deprived of this means of livelihood and the traveling public will be prevented from traveling by plaintiff's service, as they would otherwise choose to do. That defendant commerce commission by law is not responsible in damages for such loss or injury to plaintiff, to plaintiff's employees, nor to the public, and such losses are not compensable in damages; that even a temporary cessation of plaintiff's service would cause irreparable loss and injury and would be equivalent to a final adjudication in defendant's favor despite the numerous issues of law and facts which can only be determined by a full hearing on the merits.

Wherefore, plaintiff prays:

1. That a court, constituted as required by said Act of October 22, 1913, U. S. C., Title 28, section 47, be convened and that said court, as constituted and convened, after hearing had upon due and legal notice to defendants, enter its order setting aside and annulling said order of said Interstate Commerce Commission, and each and every part thereof, and forever enjoining any construction thereunder;
2. That plaintiff have and recover of said defendants his proper costs of suit;
3. That plaintiff have such other, further, and general relief as may be equitable and proper.

Attorney for plaintiff.

Source of Form.

Adapted from record in *United States v. Maher*, 307 U. S. 148, 83 L. ed. 1162, 59 Sup. Ct. 768.

Statutory References.

Injunction, 7 F. C. A., Title 28, § 47; U. S. C. A., Title 28, § 47; id. U. S. C.

Intervention, 7 F. C. A., Title 28, §§ 45a, 48; U. S. C. A., Title 28, §§ 45a, 48; id. U. S. C.

Jurisdiction of courts, 7 F. C. A., Title 28, §§ 41 (28), 44, 46; U. S. C. A., Title 28, §§ 41 (28), 44, 46; id. U. S. C.

Motion to dismiss answer or petition, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.

No replication of answer necessary, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.

Orders, writs, and processes may run, be served and be returnable anywhere in the United States, 7 F. C. A., Title 28, § 44; U. S. C. A., Title 28, § 44; id. U. S. C.

Petition, form, and service thereon, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.

Procedure, 7 F. C. A., Title 28, §§ 44, 45, 45a, 47, 47a, 48; U. S. C. A., Title 28, §§ 44, 45, 45a, 47, 47a, 48; id. U. S. C.

Venue, 7 F. C. A., Title 28, § 43; U. S. C. A., Title 28, § 43; id. U. S. C.

937. Answer to Complaint to Set Aside Order of Interstate Commerce Commission.

(Caption.)

United States, one of the defendants in the above-entitled cause, for answer to the complaint filed herein against it, answers and says:

I

United States admits the truth of the facts alleged in paragraphs I, III, and IV of the complaint, except that it denies that the allegations of said paragraph IV contain full, correct, and complete statements concerning the report and orders of the Interstate Commerce Commission which are therein mentioned, and for full and complete information concerning them the court is respectfully referred to the full text of said report and orders, copies of which are attached hereto and made a part of this answer as "Exhibit A."

II

Answering paragraph II of the complaint, United States says that it is without knowledge or information sufficient to form a belief as to the truth of the averment that plaintiff is now a common carrier by motor vehicle; but United States denies each and every other allegation made and contained in said paragraph II of the complaint.

III

Answering paragraph V of the complaint, United States denies each and every allegation therein; and, further, denies that said order is unlawful or void for any of the reasons alleged in said paragraph V or anywhere in the complaint.

Wherefore, United States prays that the complaint be dismissed at the cost of the petitioners.

Special assistant to the attorney-general.

Assistant attorney-general.

United States attorney, District of ____.

Assistant United States attorney.

Source of Form.

Adapted from record in *United States v. Maher*, 307 U. S. 148, 83 L. ed. 1162, 59 Sup. Ct. 768.

Cross-Reference.

In connection with Forms 937, 938, see notes to Form 936.

Statutory Reference.

Answer required, form and service thereon, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.

938. Complaint to Enjoin Violations of Motor Carrier Act.

District Court of the United States

District of _____

Interstate Commerce Commission,
Plaintiff,

v.

Civil File No. _____

Defendant.

COMPLAINT

The Interstate Commerce Commission, hereinafter called the "Commission," files this complaint against the defendant above-named, and thereupon complains and alleges:

FIRST COUNT**I**

That this suit is brought and the jurisdiction of this court is invoked under the provisions of the Motor Carrier Act, 1935, as amended, and particularly of section 222 (b) thereof (U. S. C., Title 49, section 322 (b)).

II

That at all times herein mentioned the defendant — was and is engaged in the transportation of passengers for the general public in interstate commerce by motor vehicle for compensation, over and upon the public highways of the United States and particularly over and upon the public highways between the city of — in the state of — and within the jurisdiction of this court, and the city of — in the state of — and was and is a common carrier of passengers by motor vehicle subject to the provisions of the Motor Carrier Act, 1935, as amended (U. S. C., Title 49, chapter 8).

III

That daily, except Sunday, throughout the periods, to wit, from —, to —, 19—, inclusive, and from —, to —, 19—, inclusive, the said — did transport and cause to be transported, passengers from the city of —, state of —, within the district of — and within the jurisdiction of this court, by motor vehicle over and upon the public highways to the city of —, in the state of —, and from said city of — to said city of —, and did charge, demand, collect, and receive therefor from each of said passengers as compensation for each such round-trip, the sum of, to wit: — dollars (\$—), lawful money of the United States.

IV

That at the time said passengers, and each of them, as aforesaid were transported in interstate commerce, as aforesaid, there was not in force and there is not now in force, with respect to said motor carrier, a certificate of public convenience and necessity issued by said commission authorizing such transportation and such operations, and at all of the times aforesaid, there was not on file with the said commission and there is not now on file with said commission, any application to the said commission by the said motor carrier for such certificate of public convenience and necessity and the said transportation of the said passenger by motor vehicle, as aforesaid, was and is without warrant or authority at law.

V

That the plaintiff is informed and believes that unless restrained by this court, said motor carrier intends to and will, in the manner and form aforesaid, or otherwise, continue to transport passengers for the general public in interstate commerce by motor vehicle, over and upon the public highways within the states and between the points set forth above and between other points within the United States for compensation and intends to and will in the manner and form aforesaid, or otherwise, continue to seek to evade and defeat the regulations provided in the Motor Carrier Act, 1935, as amended; that the said acts of the said motor carrier and each of them are in violation of sections 206 and 222 of the Motor Carrier Act, 1935, as amended, and as such are subject to be enjoined by this court on application and suit of plaintiffs aforesaid under the express provisions of the said act, more particularly section 222 (b) thereof.

SECOND COUNT

Further complaining of the above-named defendant and for a second count plaintiff alleges:

I

The facts and allegations set forth above in sections I, II, and III, of the first count are hereby referred to, and by this reference adopted and incorporated in this count as fully as if they were herein repeated.

II

That at the times said passengers, and each of them, as aforesaid, were transported in interstate commerce as aforesaid, the said motor carrier had not filed with the said commission and there was not on file with the said commission, any tariff showing any rate or fare, or any evidence of concurrence by said motor carrier, in, or acceptance of, any rate or any fare applicable, or by the said motor carrier, so applied, to such transporta-

tion of the said passengers; that the said motor carrier has wholly failed and omitted to file with the said commission, and there is not now on file with the said commission, any tariff showing the rates and fares of the said motor carrier for transportation of passengers in interstate commerce over the aforesaid public highways and routes, for compensation.

III

That the plaintiff is informed and believes, that unless restrained by this court, the said motor carrier intends to and will in the manner and form aforesaid, or otherwise, continue to transport passengers for the general public in interstate commerce, by motor vehicle, over and upon the public highways within the states and between the points above set forth, for compensation, and engage in the transportation of passengers by motor vehicle, for the general public in interstate commerce, over the public highways for compensation, without first filing with the said commission and having on file with the said commission any tariff showing the rates and fares for which said passengers are transported, and intends to and will in the manner and form aforesaid, or otherwise, continue to seek to evade and defeat the regulation provided in the Motor Carrier Act, 1935, as amended.

IV

That the said acts of the said motor carrier, and each of them, are in violation of sections 217 and 222 of the Motor Carrier Act, 1935, as amended, and as such are subject to be enjoined by this court on the application and suit of plaintiff aforesaid, under the express provisions of said act, more particularly section 222 (b) thereof.

THIRD COUNT

Further complaining of the above-named defendant and for a third count plaintiff alleges:

I

That the facts and allegations set forth above in section I, II, and III, of the first count are hereby referred to, and by this reference adopted and incorporated in this count as fully as if they were herein repeated.

II

That at the times said passengers, and each of them, as aforesaid, were transported in interstate commerce as aforesaid, there were and now are in force and effect rules and regulations duly and regularly prescribed and promulgated by said Interstate Commerce Commission pursuant to the provisions of section 215 of the said Motor Carrier Act, 1935, providing that

no motor carrier subject to the provisions of said Motor Carrier Act, shall engage in interstate or foreign commerce unless and until there shall have been filed with and approved by said commission, and maintained in effect, a surety bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements, in not less than stated amounts, conditioned to pay, within the amount of said surety bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from negligent operation, maintenance, or use of motor vehicles as a common carrier in the transportation of passengers in interstate commerce for compensation, upon the public highways, and for loss or damage to the property of others.

III

That at all times mentioned in this count the said motor carrier wholly failed, neglected, and refused to file with said commission, and maintain in effect, and there is not now on file with said commission, and in effect, a surety, bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements conditioned as aforesaid, or at all, as required by said rules and regulations.

IV

That the plaintiff is informed and believes, that unless restrained by this court, the said motor carrier, intends to and will, in the manner and form aforesaid, or otherwise, continue to transport passengers for the general public in interstate commerce by motor vehicle over and upon the public highways within and between the states and between the points above set forth, and between other points within the United States, for compensation, without first or at all filing with said commission, and maintaining in effect, a surety bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements, conditioned to pay any final judgment recovered against him as such motor carrier for bodily injuries to or the death of any person resulting from negligent operation, maintenance, or use of motor vehicles as a common carrier in the transportation of passengers in interstate commerce, for compensation, upon the public highways and for loss or damage to the property of others, or otherwise, or at all complying with the aforesaid rules and regulations of the said commission, and intends to and will in the manner and form aforesaid, or otherwise, continue to seek to evade and defeat the regulation provided in the Motor Carrier Act, 1935, as amended.

V

That the said acts of the said motor carrier, and each of them, are in violation of sections 215 and 222 of the Motor Carrier Act, 1935, and as

such are subject to be enjoined by this court on the application and suit of plaintiff aforesaid, under the express provisions of the said act, more particularly section 222 (b) thereof.

Wherefore, plaintiff demands judgment as follows:

(A) That the defendant, —, his agents, employees, and representatives, and all others acting by or under his direction or authority, and all persons, firms, companies, and corporations; and their respective officers, servants, agents, employees, and representatives, in active concert of participating with him, be perpetually enjoined and restrained from in any manner or by any device, directly or indirectly, transporting passengers by motor vehicle in interstate commerce, over or upon the public highways, for the general public, for compensation, whether over regular or irregular routes, unless and until such time, if at all, as:

(1) There is in force with respect to said — a certificate of public convenience and necessity issued by the Interstate Commerce Commission of the United States, authorizing such operations, or,

(2) The said — shall have first made application for such certificate to the said Interstate Commerce Commission as provided in paragraph (b) of section 206 of the Motor Carrier Act, 1935, and in accordance with the rules and regulations duly promulgated by the said Interstate Commerce Commission, and shall have made the showing in such application that, by virtue of the provisions of section 206 (a), he, the said —, is entitled to continue such operations pending the determination of such application; and

(3) The rates and fares upon which the said passengers are transported, or are undertaken to be transported by said —, have been first filed with the said Interstate Commerce Commission and have been published and posted in the form and manner prescribed by the said commission by regulation, duly promulgated; and

(4) The said — shall have filed with the said Interstate Commerce Commission, and shall continue to have on file and to maintain in full force and effect in conformity with the rules and regulations of said commission, duly promulgated and in effect, a surety bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements approved by the said commission and conditioned to pay within the amount of said surety bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements, any final judgment recovered against such motor carrier for bodily injury to or the death of any person resulting from negligent operation, maintenance, or use of motor vehicles, as a common carrier in the transportation of passengers in interstate commerce, for compensation, upon the public highways, and for loss or damage to the property of others; and

(B) That the plaintiff have such other and further relief in the premises as justice and equity may require.

United States attorney.

Source of Form.

Adapted from record in Interstate Commerce Comm. v. Frye (D. C.-Mass.), 26 Fed. Supp. 393.

Statutory Reference.

Power of courts to enforce and restrain violations of Motor Carrier Act, 10A, F. C. A., Title 49, § 322; U. S. C. A., Title 49, § 322; id. U. S. C.

939. Answer to Complaint to Enjoin Violations of Motor Carrier Act.

(Caption.)

FIRST COUNT

I

The defendant admits the allegations in paragraph I of the complaint.

II

The defendant admits that from time to time he did transport, for consideration, passengers over public highways between the city of —, in the state of —, and the city of —, in the state of —, but denies that he is a common carrier subject to the provisions of the Motor Carrier Act, 1935, as amended.

III

The defendant denies the allegations in paragraph III that he transported daily, except Sundays, between — — to — —, 19—, inclusive, and from — — to — —, 19—, inclusive, passengers for hire upon the public highways between the city of —, state of —, and the city of —, state of —.

IV

The defendant admits the allegations in paragraph IV to the effect that there was not in force a certificate of public convenience and necessity or any application for such certificate of public convenience and necessity, and further states that as to him, he was not and is not required to have same in force or an application for same on file.

V

The defendant denies the allegations contained in paragraph V of the plaintiff's complaint.

SECOND COUNT

I

The answers to paragraphs I, II, and III to the first count are hereby referred to and by this reference adopted and incorporated in this count as fully as if they were herein repeated.

II

The defendant admits the allegations in paragraph II and further answers that as to him there was no need for him to file with the said commission any tariff showing any rate or fare.

III

The defendant denies the allegations contained in paragraph III.

IV

The defendant denies the allegations continued in paragraph IV.

THIRD COUNT

I

The answers to paragraphs I, II, and III to the first count are hereby referred to and by this reference adopted and incorporated in this count as fully as if they were herein repeated.

II

The defendant admits the allegations contained in paragraph II.

III

The defendant admits so much of the allegations in paragraph III as relate to his failure to file with said commission a surety bond, policy of insurance, certificate of insurance, qualifications as a self-insurer, or other securities or agreements conditioned as aforesaid, but denies that he is such a carrier as to come within the said rules and regulations.

IV

The defendant denies the allegations contained in paragraph IV.

V

The defendant denies the allegations contained in paragraph V.

Attorney for defendant.

Source of Form.

Adapted from record in Interstate Commerce Commission v. Frye (D. C.-Mass.), 26 Fed. Supp. 393.

Cross-Reference.

See notes to Forms 936, 938.

940. Complaint to Set Aside an Order of Interstate Commerce Commission.

• District Court of the United States

_____ District of _____

_____ Division

FL, JG, and JF, as Trustees of the
Estate of the C., R. I. & P. Railway
Company and as Trustees of the
Estate of the C., R. I. & G. Railway
Company,

Plaintiffs,

No. _____

v.

United States and Interstate Com-
merce Commission,

Defendants.

COMPLAINT

1. The C., R. I. and P. Railway Company is a railroad corporation organized under the laws of the states of _____ and _____, respectively, by articles of consolidation dated _____, 18—, and renewed _____, 19—. On _____, 19—, said corporation filed its petition in the District Court of the United States for the _____ District of _____, _____ Division, pursuant to section _____ of the Acts of Congress relating to bankruptcy, and on the same date said court entered an order approving said petition as properly filed under said section _____.

The C., R. I. and G. Railway Company is a railroad corporation organized under the laws of the state of _____. On _____, 19—, said corporation filed its petition in the District Court of the United States for the _____ District of _____, _____ Division, alleging that its entire capital stock (except directors' shares) having power to vote for the election of directors was owned by said The C., R. I. and P. Railway Company, and that it desired to effect a plan of reorganization in connection with the plan of reorganization of said The C., R. I. and P. Railway Company. By order entered the same day, said court approved said petition as properly filed under said section _____.

On _____, 19—, said court entered an order in said reorganization proceedings appointing plaintiffs as trustees of all and singular the railroads, lands, properties, estates, rights, and franchises, of whatever character and wherever situate, of the C., R. I. and P. Railway Company and of the C., R. I. and G. Railway Company, effective _____, 19—; by order of said court entered _____, 19—, the said appointment was made permanent. Plaintiffs are now, and have been at all times since _____, 19—, the duly appointed, qualified, and acting trustees of the estates of the said railroad corporations, respectively, and as such, are and have been

at all times engaged in the transportation of freight and passengers for hire in interstate commerce, subject to the Interstate Commerce Act.

Each of the plaintiffs is a citizen and resident of the state of _____. JG and JF each reside in the city of _____, _____.

2. The United States of America is made defendant in this suit pursuant to the provisions of the Act of Congress approved _____, 19____, 38 Stat. at L. 219, known as "Urgent Deficiencies Appropriation Act."

3. The commission is an administrative tribunal, created by the act to regulate commerce, 24 Stat. at L. 379, approved _____, 18____, as amended (the Interstate Commerce Act), and is specifically charged with the administration and the enforcement of said act.

4. On or about _____, 19____, plaintiffs filed with the secretary of the commission, _____, _____, their application to the commission for authority under par. (4) of section 5 of the Interstate Commerce Act, as trustees of the estate of the C., R. I. and P. Railway Company, to lease the properties comprising the estate of the C., R. I. and G. Railway Company, and for authority, as trustees of the estate of the C., R. I. and G. Railway Company, to grant said lease, all upon the terms, conditions, and provisions set forth in the draft of lease attached to and made a part of said application. Said application was received and filed by the commission and was numbered _____ on its finance docket. Thereafter, on _____, 19____, the commission held a hearing at _____, _____, upon said application.

5. Said proceeding was thereafter heard by and submitted to division four of the commission, which, by report dated _____, 19____, found that the proposed lease will be in harmony with and in furtherance of the commission's plan for the consolidation of railroad properties, and will promote the public interest, upon the terms and conditions proposed in said report (a copy of which is filed herewith, marked "Exhibit A" and made a part hereof). Said report contained the following:

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

6. Thereafter, plaintiffs sought for and obtained a rehearing and reargument before the entire commission, and on _____, 19____, the commission issued its report and entered an order approving and authorizing said lease, upon the terms and conditions set forth in said lease, but only upon the conditions prescribed in the said report of division four of the commission, dated _____, 19____, in said proceeding and contained in paragraphs numbered 1, 2, 3, 4, of said report (a copy of which report and order of _____, 19____, is filed herewith, marked "Exhibit B" and made a part hereof).

7. Plaintiffs are informed and believe that each and every of the conditions prescribed in said report of division four of the commission, dated _____, 19____, and referred to and adopted by the commission in said order entered _____, 19____, are void and beyond the power and authority of the commission to impose. Plaintiffs are advised and believe that the commission is without power or authority to impose conditions of the kind

and nature of those prescribed in its said order and is without power, in approving and authorizing a lease of railroad properties by one carrier subject to the Interstate Commerce Act to another carrier likewise subject, to require said carriers, or either of them, to pay money to employees to reimburse them for financial loss, in whole or in part, suffered as a consequence of or arising from the consummation of such lease.

8. The subject-matter of the said conditions is not one in respect of commerce, and that said conditions, and the obligations attempted to be imposed thereby upon petitioners, are without the grant of authority to regulate interstate and foreign commerce contained in article I, section 8, of the Constitution of the United States. Further, the said conditions and the obligations attempted to be imposed upon petitioners thereby, deprive plaintiffs of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

9. As a result of operation under said lease, there are approximately — employees whose positions would be lost or abolished; that if each of such employees retained the status entitling him to a dismissal allowance for the full period of payment and in the full amount prescribed in said conditions, plaintiff would be required to pay from the funds of the several estates of which they are trustees as aforesaid, on account of such dismissal allowance, not less than the following amounts: * * * Plaintiffs are unable to arrive at an exact estimate of the total cost of compliance with those of said conditions which require, as respects employees who are continued in service after commencement of operation under the said lease; First. That no such employee be placed in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under the lease; second, reimbursement for expenses of a transferred employee moving his household and other personal effects, for traveling expenses of himself and immediate family, and his actual wage loss (not exceeding 2 days) while moving; and third, protection of a transferred employee against any loss suffered in the sale of his home, or in securing cancelation of an unexpired lease of a dwelling occupied by him as a home. Plaintiffs allege, upon information and belief, that the total cost of compliance with said conditions would be no less than — dollars (\$——).

10. The said lease and the operation of the railways covered thereby in accordance with the terms thereof will be beneficial to the estates of which plaintiffs are trustees as aforesaid, in that such lease operations will obviate the necessity for expenditures which have been and which must otherwise continue to be made, to an amount in excess of — dollars (\$——) per year; that said expenditures are excessive, are not in the public interest, and are a burden upon interstate commerce. That said excessive expenditures are required under the present plan of separate operation of the properties comprising the estate of the C., R. I. and G. Railway Company in accordance with the laws of the state of —. Plaintiffs desire, therefore, to make and enter into the said lease and to operate the leased

properties as therein provided in order to obtain the benefits accruing therefrom to the said estates. The Interstate Commerce Act provides, by section 10 thereof, that any trustee acting for a common carrier corporation which is subject to the provisions of Part I of said act, who shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter, or thing in said Part I prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in said part required to be done, or shall be guilty of any infraction of said Part I for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be subject to a fine of not to exceed — dollars (\$—) for each offense. That by section 12 of said Part I, the commission is authorized and required to execute and enforce the provisions of said Part I, and, upon the commission's request, it is the duty of any district attorney of the United States to whom the commission may apply, to institute and prosecute all necessary proceedings for the enforcement of the provisions of said Part I and for the punishment for all violations thereof.

The state of —, acting by and through its attorney-general, was allowed by the commission to intervene in said proceeding in said Finance Docket No. —, and appeared at said hearing upon the application therein, and thereafter participated by exceptions, brief, and oral argument in opposition to the granting of the application, contending that the making of the lease and operations thereunder would be contrary to the interests of the state of — and to its Constitution and statutes.

The Constitution of the state of —, by article —, section —, provides: [Here insert].

The statutes of the state of — relating to permission to transact business in the state of — by any corporation organized or created under the laws of any other state (being chapter 19 of Vernon's Texas Statutes, 1936), provide: [Here insert].

Such statutes further provide (Ibid., Title 112—Railroads, Chap. 2, Art. 6278): [Here insert].

If said lease is entered into and the leased properties operated pursuant thereto, but without compliance by plaintiffs with the conditions prescribed in said order of the commission, plaintiffs will be exposed to the hazard: First. Of having criminal or civil proceedings instituted against them for violation of the Interstate Commerce Act or for violation of the commission's said order of — —, 19—; second, of the forfeitures and penalties provided for in and by said statutes of the state of — for alleged violation thereof; and third, to numerous actions at law by various persons claiming the benefit of the said conditions, to recover various amounts of money alleged to be due and owing to them, respectively, by virtue of the terms and provisions of said conditions.

11. Unless the relief prayed for herein, including the issuance of an interlocutory or temporary injunction be granted herein to plaintiffs, they

will suffer, for the reasons and in the manner stated in this complaint, irreparable injury and damage.

Wherefore, plaintiffs pray:

1. That the defendants, their officers, agents, and attorneys, be perpetually restrained and enjoined from enforcing, or attempting to enforce, the said order entered — —, 19—, by the institution of civil or criminal proceedings against the plaintiffs by reason of the nonpayment by plaintiffs, after said lease shall have been entered into by them and operations begun thereunder, of any of the sums designated as compensation, dismissal allowance, reimbursement for moving expenses, losses from sales of homes and cancelation of leases, and any and all other such amounts of whatsoever nature, specified in said conditions.

2. That this court order and adjudge that the part of said order entered — —, 19—, which adopts, refers to, and incorporates the conditions prescribed in the report of division 4 of the commission, dated — —, 19—, and set forth at length in said report in paragraphs numbered 1, 2, 3, and 4 thereof, is, and has at all times been, beyond the lawful authority of the commission and wholly void, and that the said part be perpetually set aside, suspended, and annulled, and the enforcement thereof perpetually enjoined.

3. That a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending the enforcement of so much of said order of the commission as is specified in paragraph 3, until the further order of this court.

4. That plaintiffs may have such other and further relief in the premises as justice may require.

Attorney for plaintiff.

Source of Form.

Adapted from record in United States v. Lowden, 308 U. S. 225, — L. ed. —, — Sup. Ct. —.

Statutory Reference.

Regulation of railroads by Interstate Commerce Commission, 10A, F. C. A., Title 49, §§ 1 to 27; U. S. C. A., Title 49, §§ 1 to 27; id. U. S. C.

Cross-Reference.

In connection with Forms 940, 941, see notes to Form 936.

941. Answer of United States of America.

(Caption.)

United States of America, one of the defendants in the above-entitled action, for answer to the complaint filed therein against it, answers and says:

I

United States admits the truth of the facts alleged in the opening paragraph and paragraphs numbered 1, 2, 3, 4, 5, and 6, inclusive, of the complaint.

II

United States denies the matters, things, and conclusions alleged in paragraphs numbered 7, 8, 9, and 11 of the complaint.

III

Answering paragraph numbered 10 of the complaint United States denies that the matters and things alleged in the first three sentences of said paragraph are within the jurisdiction of this court and alleges that said matters are within the exclusive jurisdiction of the Interstate Commerce Commission. Answering the remaining allegations of said paragraph 10, United States admits that the Interstate Commerce Act and the Constitution of the state of — and the statutes of that state contain the provisions mentioned in said paragraph 10.

IV

FIRST DEFENSE

Said order of the Interstate Commerce Commission merely approves and authorizes the lease therein described, upon the terms and conditions set forth by the commission; but the order does not command, direct, or compel plaintiffs to exercise or execute the authority thereby granted. There is no provision of law or penalty enforceable against plaintiffs for failure or refusal to exercise or execute the authority conferred upon them by said order; but United States admits that plaintiffs are without authority lawfully to avail themselves of and to exercise the authority conferred by said order to execute the lease therein described without also complying with the terms and conditions attached to and made a part of the authorization contained in said order.

V

SECOND DEFENSE

United States denies that this court has power or jurisdiction to annul and enjoin the terms and conditions prescribed by said order without simultaneously enjoining and annulling the entire order as made and entered by said commission; and United States further denies that said terms and conditions may be separated from or dealt with separately from the order as a whole, as made and entered by the commission; and United States further denies that this court has power or jurisdiction to grant the relief prayed by the complaint.

Wherefore, United States prays that the complaint be dismissed at the cost of the plaintiffs.

Special assistant to the attorney-general.

Source of Form.

Adapted from record in United States
v. Lowden, 308 U. S. 225, — L. ed. —, —
Sup. Ct. —.

CHAPTER 28

FEDERAL TRADE COMMISSION

Form

- 950. Complaint.
- 951. Answer.
- 952. Order appointing examiner.
- 953. Motion for issuance of supplemental complaint.
- 954. Order for issuance of supplemental complaint.
- 955. Order to cease and desist.

Form

- 956. Application for enforcement of order of Federal Trade Commission.
- 957. Answer to application for enforcement of order of commission.
- 958. Petition for review of order of Federal Trade Commission.
- 959. Order allowing filing of petition for review.

INTRODUCTION.—Section 5 of the Federal Trade Commission Act declares that “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful” and empowers and directs the Commission to prevent “persons, partnerships, or corporations, except banks, common carriers subject to the acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers’ and Stockyard Act, 1921, except as provided in section 406 (b) of said act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.”

Whenever the Commission has reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce or any unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. Provision is made for hearings and the taking of testimony. If the Commission is then of the opinion that the method of competition or the unfair or deceptive act or practice in question is prohibited by this act, it issues and causes to be served upon the person or organization against whom complaint is made its findings of fact and an order to cease and desist from such unfair method of competition and such unfair or deceptive act or practice.

Provision is made for petition to a circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, within 60 days from the date of the service of such order to modify or set aside such order of the Commission. Upon such petition the court has power to affirm, modify, or set aside such

order, and to enforce the same to the extent that such order is affirmed. An order of the Commission to cease and desist becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; and, in case petition for review has been duly filed within the time allowed, the order of the Commission becomes final when it is affirmed by a circuit court of appeals, or, if certiorari has been granted, at such time as the decision has been affirmed by the Supreme Court.

A letter to the Commission stating the employment of unfair practices by some concern is sufficient to institute Commission's consideration of a proceeding. If the letter clearly discloses that nothing is charged within the jurisdiction of the Commission, it is filed without further action. If it appears, however, that there may have been such a violation of law, the matter is settled, after further investigation, by stipulation and agreement with the concern named in the letter, or by the issuance of a formal complaint followed by a formal trial of the charges, as required by the facts of the particular case and by the public interest, or by dismissal of the charges.

A formal proceeding, instituted by a formal complaint and followed by the taking of testimony, filing of briefs, and oral argument, is terminated by the entry of a formal order to cease and desist or by order terminating or closing the case. Such a proceeding is prosecuted in the name of the Commission by the chief counsel's division, and testimony and evidence in such proceeding are proffered before a member of the trial examiner's division, who is charged with passing upon the testimony and evidence and with other details incident to the trial of the case.

950. Complaint.

United States of America
before
Federal Trade Commission
Docket No. —

In the Matter of — Education Society, a corporation; —, individually
and as president of — Education Society.

COMPLAINT

Acting in the public interest pursuant to the provisions of an Act of Congress, approved — —, 19—, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the — Education Society, a corporation, and —, individually and as president of the — Education Society, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act, and states its charges in that respect as follows:

1. Respondent, — Education Society, is a corporation organized, existing, and doing business under and by virtue of the laws of the state of —, with its principal place of business located in the city of —, state of —. Respondent, —, is president and general manager and principal owner of the stock of the — Education Society. Respondents, — Education Society and —, are now and for more than five years last past have been engaged in the compilation and/or production of sets of encyclopedias or reference works and/or so-called "extension services" in connection therewith, and in the sale and distribution thereof in commerce between and among various states of the United States, causing said products, when sold, to be shipped and transported in interstate commerce from their place of business located in the state of — to purchasers thereof located in states of the United States other than the state of —. Respondents, in the course and conduct of their business, are and at all times herein referred to have been in competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution in interstate commerce of books, sets of encyclopedias, or reference works and/or so called "extension services" in connection therewith.

2. Respondents employed various agents, upon a commission basis, in the several states of the United States to sell their encyclopedias, reference books, and/or so-called "extension services" in connection therewith by personal solicitation. The orders received by the said agents are transmitted to the main office of respondents in —, —, and the said books or publications are shipped in interstate commerce from the city of — to the purchasers so ordering them at their respective places of residence in the several states of the United States and in the District of Columbia. Respondents sell their said encyclopedias, reference books, and/or so-called "extension services" in connection therewith in the manner above set forth to school teachers, students, businessmen, and to the general public located in the several states of the United States, and for the purpose of selling said products in commerce between and among the various states of the United States, respondents have adopted and employed and are now employing the following methods, to wit:

(a) Respondents distribute among prospective customers located in the several states of the United States circular letters and other literature in which they represent that complimentary sets of the Standard Reference Work will be distributed among a few representative people before respondents institute their sales campaign, and that the cost in connection therewith is absorbed by their advertising appropriation; that a loose-leaf extension service, which keeps their encyclopedia constantly up to date, is a most attractive feature of their work, and that their new Standard Reference Work has recently been completed by some of the best-known editors in the United States, and splendid indorsements already received from some of the leading colleges and schools throughout the country; that to recipients of complimentary sets the loose-leaf extension service will be supplied on the same terms as to regular subscribers. Respondents request

the recipients of the aforesaid circulars or literature to treat same as personal and confidential and emphasize that they are authorized to present said recipients with a complete, full-bound set of this new work, in an artcraft de luxe edition with the compliments of the publishers.

(b) Respondents represent through their salesmen or agents and by other means that they will present free of charge to prospective customers a certain number of their reference books or sets of encyclopedias entitled "The Standard Reference Work" upon the condition that the said prospective customer subscribe to and purchase the so-called "extension service" designated "The Standard Loose-Leaf Extension Service" for a specified sum of money and for a specified period of time, the said sum of money being represented to be a special price offered for advertising purposes to a limited number of persons residing in a given community, and/or as being a price much lower than the price regularly charged for their books or sets of encyclopedias and/or loose-leaf extension service, when in truth and in fact said sum of money, represented as aforesaid, was and is the usual and customary price to all persons who can be induced to purchase said reference books, sets of encyclopedias, and/or loose-leaf extension service, and when in truth and in fact it is not the practice of said respondents to confine their aforesaid representations and offers or those of their salesmen or agents to a certain number of persons, solicited or otherwise, in each community who had been designated to receive the said books or sets of encyclopedias or any form of service free, but it was and is the practice, intention, and desire of respondents to dispose of the aforesaid products to the general public in each community and at the same price or figure, and when in truth and in fact the respondents had not and do not set aside a certain number of their books or encyclopedias for advertising purposes to be given free as indicated by the representations of respondents or by other means.

(c) Respondents represent and have represented through their salesmen or agents and through circulars and by other means that they will give away free, as a premium, certain books or sets of books written by well-known authors, to subscribers of their sets of encyclopedias and/or loose-leaf extension service, when in truth and in fact the said books or sets of books so offered as free gifts or premiums for the subscription so obtained were not given away, but the cost thereof was included in the price asked for the said subscriptions.

(d) Respondents have made and are making use of alleged testimonials or recommendations of certain prominent educators and others known to prospective customers and have represented and do represent that respondents' publications have been authorized and approved or indorsed by numerous state boards of education, when in truth and in fact the said alleged testimonials or recommendations or indorsements were not authorized or made by and/or used with the knowledge and approval of said educators, or approved by the various state boards of education as alleged.

(e) Respondents have represented and represent through their salesmen or agents, by the use of prospectuses and otherwise, that their said reference books or sets of encyclopedias were recently completed and had been copyrighted in 19—, when in truth and in fact such was not the case.

(f) Respondents have caused and do cause their said sets of encyclopedias or reference works and/or their loose-leaf or revision services to be advertised and sold in interstate commerce under the various titles "Standard Reference Work," published by — Education Society, and "National Encyclopedia, published by National Encyclopedia Company," when in truth and in fact the said encyclopedia and/or the said loose-leaf extension service, though advertised and sold under the different titles aforesaid, were the same or substantially the same works or products.

(g) Respondents have caused and do cause to be advertised and distributed through their salesmen or agents and otherwise, among prospective customers or students located in various states of the United States, a contract in connection with their so-called "Standard Extension University," the said contract having printed on its top border in red ink the statement "Special Introductory Enrollment this is a life-time scholarship," when in truth and in fact the said contract, its quoted enrollment fee, and other contents were in no wise "Special" but were the same as have always been used by the respondents in soliciting the sale of and selling their courses to customers or students or prospective customers or students located in various states of the United States.

4. The acts and things above alleged to have been done by respondents are to the prejudice of the public and respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved — —, 19—.

Wherefore, the premises considered, the Federal Trade Commission on this — day of —, 19—, now here issues this its complaint against said respondents.

NOTICE

Notice is hereby given you, the respondents herein, that the — day of —, 19—, at — —. M., is hereby fixed as the time and the offices of the Federal Trade Commission, in the city of —, —, as the place when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said act, to appear and show cause why an order should not be entered by said commission requiring you to cease and desist from the violation of the law charged in this complaint.

You are notified and required within 30 days from service of the complaint unless such time be extended by order of the commission to file with the commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of

Practice adopted by the commission with respect to answer and failure to answer (Rule III) provide as follows: [Here insert].

(1) In case respondents shall desire to contest the proceedings such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondents shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondents are without knowledge, in which case respondents shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer unless respondents shall state in the answer that respondents are without knowledge shall be deemed to be admitted to be true and may be so found by the commission.

(2) In case respondents desire to waive hearing on the charges set forth in the complaint and not to contest the proceeding the answer may consist of a statement that respondents refrain from contesting the proceeding or that respondents consent that the commission may make, enter, and serve upon respondents an order to cease and desist from the violation of the law alleged in the complaint or that respondents admit all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the commission to find such allegations to be true.

(3) Failure of the respondents to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In witness whereof the Federal Trade Commission has caused this complaint to be signed by its secretary, and its official seal to be hereto affixed, at —, —, this — day of —, 19—.

By the commission:

Secretary.

[SEAL]

Source of Form.

From record in Federal Trade Comm. v. Standard Education Soc., 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

Statutory References.

Definitions, 4 F. C. A., Title 15, § 44; U. S. C. A., Title 15, § 44; id. U. S. C.

Intervention, 4 F. C. A., Title 15, § 45 (b); U. S. C. A., Title 15, § 45 (b); id. U. S. C.

Issuance of complaint, notice, 4 F. C. A., Title 15, § 45 (b); U. S. C. A., Title 15, § 45 (b); id. U. S. C.

Power of commission, 4 F. C. A., Title 15, § 45; U. S. C. A., Title 15, § 45; id. U. S. C.

Service of process, return, 4 F. C. A., Title 15, § 45 (b); U. S. C. A., Title 15, § 45 (b); id. U. S. C.

NOTES TO DECISIONS

In General.

Complaint against distributors and agents of ties, and also of bagging, both used and necessary in bailing cotton, charging them with practice of refusing

to sell ties except in connection with corresponding quantities of bagging, was insufficient without charging further facts and circumstances connecting the practice with monopoly, hinderance to

competition, or injury to the public. Federal Trade Comm. v. Gratz, 253 U. S. 421, 64 L. ed. 993, 40 Sup. Ct. 572, affg. 258 Fed. 314, 11 A. L. R. 793.

Alleging that practice of varying discounts tended unduly to hinder competition between distributors of products to retailer or directly to the consuming public is a pleader's conclusion. Mennen Co. v. Federal Trade Comm. (C. C. A. 2), 288 Fed. 774, 30 A. L. R. 1120. Cert. den. 262 U. S. 759, 67 L. ed. 1219, 43 Sup. Ct. 705.

Complaint did not support order of commission that petitioners for revision cease and desist from certain advertisements claimed to be misleading. L. B. Silver Co. v. Federal Trade Comm. (C. C. A. 6), 289 Fed. 985.

There should be a sufficient complaint issued and served. Heuser v. Federal Trade Comm. (C. C. A. 7), 4 Fed. (2d) 632.

Facts alleged in complaint must show unfair competition. American Tobacco Co. v. Federal Trade Comm. (C. C. A. 2), 9 Fed. (2d) 570. Affd. 274 U. S. 543, 71 L. ed. 1193, 47 Sup. Ct. 663.

Complaint charging association of wholesale grocers engaged in shipping products in interstate commerce with an attempt to suppress competition and setting out the facts was sufficiently definite to support cease and desist orders. Arkansas Wholesale Grocers Assn. v. Federal Trade Comm. (C. C. A. 8), 18 Fed. (2d) 866. Cert. den. 275 U. S. 533, 72 L. ed. 411, 48 Sup. Ct. 30.

951. Answer.

— Education Society

Filed — — —, 19—

United States of America

Before Federal Trade Commission

Docket No. —

In the Matter of — Education Society, a corporation; —, individually and as president of — Education Society.

SEPARATE ANSWER OF STANDARD EDUCATION SOCIETY, A CORPORATION

Now comes — Education Society, a corporation, respondent herein, and for answer unto the complaint, answering says:

1. This respondent admits that it is a corporation organized and existing under the laws of the state of — and licensed to do business in the state of — and with its principal place of business in the city of —, and state of —; admits that it has been engaged in the compilation, production, and sale of encyclopedias, reference works, and loose-leaf extension service in connection therewith in interstate commerce throughout the United States, as alleged in said paragraph of said complaint.

2. This respondent admits that it employs various agents upon a commission basis in the several states of the United States to sell said encyclopedias, reference works, and loose-leaf extension service in part by personal solicitation, and admits that said orders for said books and publications are transmitted to the respondent at —, —, in compliance with said orders to the various states in the United States and in the District of Columbia, and that said sales are made to the general public in the several states; but denies that this respondent had adopted or employed or is now employing all of the methods set forth in paragraph 2 of said complaint.

(a) This respondent denies that it distributes or knowingly permits its agents to distribute by circular letters or other literature, representations that complimentary sets of Standard Reference Work will be distributed free to representative people before instituting its sale campaign in connection therewith. Respondent admits that this practice was in existence prior to approximately two years ago, but that same was discontinued by this respondent approximately two years ago and has not been authorized or used during the past two years or more, and denies that said method of distribution as set forth in said section (a) of paragraph 2 is an unfair method of competition within the meaning of section 5 of said act of congress.

(b) This respondent denies that it does or permits its salesmen or agents by any means to represent that it will present free of charge to prospective customers a certain number of said The Standard Reference Work upon condition that such prospective customers subscribe to and purchase The Standard Loose-Leaf Extension Service for a specific sum of money, or to represent that the said sum of money so represented is a special price for advertising purposes, and denies that it was represented that the price is lower than the price regularly charged for their books, encyclopedias, and/or loose-leaf extension service, and avers that the literature and applications or subscriptions for the purchase of the encyclopedias, reference work, loose-leaf extension service, and other books are plainly and clearly stated upon the order blank furnished by this respondent for one price for the entire set, and that no representations of prices of any portions thereof are authorized or are permitted to be made by the agents by this respondent, and that if this respondent discovers any agents violating or making representations contained in paragraph (b), that said agents are immediately rebuked therefor and upon a second offense are promptly dismissed from the service.

(c) This respondent denies that it represents or permits its salesmen or agents through circulars or other means to represent that respondent gives away free as a premium sets of books written by well-known authors to subscribers for encyclopedias, reference work, and loose-leaf extension service, but avers that the complete sets of books to be delivered for a certain price are clearly and plainly mentioned in the order blanks furnished by this respondent to its agents.

(d) This respondent denies that it makes use of any testimonials or recommendations of educators or others, except those which are authorized in writing by the representative persons and upon the request of any such educator that his testimonial be no longer used same is promptly discontinued.

(e) This respondent denies that it represents to its salesmen or agents that said encyclopedias were recently completed and copyrighted in the year 19—, but avers that in a few specific instances the printer erroneously used the year 19— when, in fact, said books were actually copyrighted in

the year 19— and as revised were recopyrighted in the year 19— and as revised were recopyrighted in the year 19—, and that said dates are correct.

(f) This respondent denies that it has continuously made a business of causing its reference work known as "The Standard Reference Work," to be published and sold under the name of the "National Encyclopedia," but avers that some years ago a certain independent dealer requested that a certain number of said Standard Reference Work be bound under the title, "The National Encyclopedia" for sale in a special locality and that this respondent did so publish and bind a limited number of said volumes under said title and that said independent dealer failed in business and was unable to fulfill his contract, and that thereupon the respondent resold said volumes on hand in certain remote territories and principally without the United States of America. In the event that any purchaser of The National Encyclopedia discovered that he possessed The Standard Reference Work the said The National Encyclopedia was returned and the entire sum of money refunded; and denies that this respondent has made a practice of selling said encyclopedia other than as herein alleged.

(g) This respondent denies that it caused or does cause to be advertised and distributed through its salesmen or agents or otherwise, among prospective customers a contract in connection with its Standard Extension University having printed on its top border the words "Special Introductory Enrollment this is a life-time scholarship," and avers that when said department was first established, approximately two years ago, said words were printed as alleged, but that about one year ago same was voluntarily discontinued by this respondent and all order blanks and contracts were promptly modified and said words completely eliminated and same has not been in use in any shape, manner, or form for approximately one year or more last past, and that this respondent has no intention of reviving the use of the same.

3. This respondent denies that it has represented or does represent to prospective purchasers of its encyclopedia, books of reference, and loose-leaf extension service, that the customary and regular prices therefor are different from those mentioned and described in the order blanks, and denies that any prices therefor are fictitious or grossly exaggerated or that said prices quoted exceed the usual and customary prices, and avers that respondent sells its reference work, loose-leaf extension service, and other books for one specified price and that no representations are made or authorized as to the prices of any one set standing alone or that the usual prices for the combined set are different from that printed on said contract form.

4. This respondent denies that any of the acts or things alleged in said complaint or any of the acts or things actually done by this respondent in the sale and distribution of its books of reference, extension service, or other books, constitute unfair methods of competition in commerce within the meaning and intent of section 5 of the Act of Congress referred to in said complaint.

And now having answered complaint herein, this respondent prays that same may be dismissed.

— Education Society,
By —, President
— St., —, —.

Attorneys for respondent,
— National Bank Bldg.,
—, —.

Source of Form.

From record in Federal Trade Comm. v. Standard Education Soc., 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

Cross-Reference.

In connection with Forms 951 to 956, see notes to Form 950.

Statutory Reference.

Appearance and defense by persons complained of, 4 F. C. A., Title 15, § 45 (b); U. S. C. A., Title 15, § 45 (b); id. U. S. C.

NOTES TO DECISIONS

Failure to Deny.

Pleadings held to have foreclosed issue as to whether or not defendants circulating an encyclopedia were engaged in interstate competition. Federal Trade Comm. v. Standard Education Soc. (C. C. A. 2), 86 Fed. (2d) 692. Revd. on other grounds 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

Under rule of practice of the commission that respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, any issue with respect to an allegation not denied is foreclosed by the pleadings. National Candy Co. v. Federal Trade Comm. (C. C. A. 7), 104 Fed. (2d) 999.

952. Order Appointing Examiner.

United States of America
Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the city of —, —, on the — day of —, 19—.

Commissioners: —, chairman; —; —; —; —.

Docket No. —

In the Matter of — Education Society, a corporation, and —, individually and as president of — Education Society.

**ORDER APPOINTING EXAMINER AND FIXING TIME AND PLACE FOR
TAKING TESTIMONY**

This matter being at issue and ready for the taking of testimony,

It is ordered that —, an examiner of this commission be, and he hereby is, designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law.

It is further ordered that the taking of testimony in this proceeding begin on —, —, —, 19—, at — —. M. of that day, at the office of the custodian, Bradford County Courthouse, —, —.

Upon completion of testimony for the Federal Trade Commission, the examiner is directed to proceed immediately to take testimony and receive evidence on behalf of the respondent. The examiner will then close the case and make his report.

By the commission: _____

[SEAL]

Secretary

Statutory Reference.

Appointment of examiners, 4 F. C. A.,
Title 15, § 42; U. S. C. A., Title 15, § 42;
id. U. S. C.

953. Motion for Issuance of Supplemental Complaint.

United States of America
Before Federal Trade Commission
Docket No. —

In the Matter of — Education Society, a corporation; —, individually
and as president of the — Education Society.

MOTION FOR ISSUANCE OF SUPPLEMENTAL COMPLAINT

Comes now —, Chief Counsel of the Federal Trade Commission, and shows to the commission that the three individuals —, —, and —, who are the directors and sole stockholders of the respondent corporation, have, subsequent to the issuance of the complaint herein, organized a new corporation known as the "Standard Encyclopedia Corporation" and that the respondent corporation herein has ceased functioning as a publisher of the Standard Reference Work and is engaged in selling only those copies of the Standard Reference Work which remains unsold from previous printings. The Standard Encyclopedia Corporation is now engaged in the publication and sale of the New Standard Encyclopedia, which is a revised edition of the Standard Reference Work, and the Chief Counsel of the Federal Trade Commission further shows to the commission that the formation of the said Standard Encyclopedia Corporation was not known to the attorney for the commission until — —, 19—, on which day, testimony having been received on behalf of the commission, the attorney for the commission rested the commission's case, and that no testimony in support of the respondent's answer has been received nor any date set for the reception thereof;

Wherefore, the chief counsel moves the Federal Trade Commission to issue a supplemental complaint herein charging the — Education Society, a corporation, Standard Encyclopedia Corporation, —, individually, as president and director of the — Education Society and as president and

director of the Standard Encyclopedia Corporation, and — and —, individually and as directors of the — Education Society and of the Standard Encyclopedia Corporation, with violation of section 5 of the Federal Trade Commission Act, and that such supplemental complaint issue against both said corporations and the three said individuals in accordance with the form attached hereto and made a part hereof; and further moves that the commission reopen the commission's case for the purpose of taking such additional testimony in support of the supplemental complaint as the attorney for the commission shall deem necessary; and further moves that the commission set a day certain as early as may be practicable to hear argument on behalf of and in opposition to the present motion, and that notice of hearing, together with a copy of the present motion, and of the form of supplemental complaint proposed to be issued, be served upon respondents through their respective counsel and upon the proposed respondent.

Chief counsel.

Source of Form.

From record in Federal Trade Comm. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh.
v. Standard Education Soc., 302 U. S. 365. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

954. Order for Issuance of Supplemental Complaint.

United States of America

Before Federal Trade Commission

At a regular session of the Federal Trade Commission held at its office in the city of —, —, on the — day of —, 19—.

Commissioners: —, Chairman; —; —; —; —.

Docket No. —

In the Matter of — Education Society, a corporation; Standard Encyclopedia Corporation, a corporation; —; —; —.

ORDER FOR ISSUANCE OF SUPPLEMENTAL COMPLAINT AND TO
REOPEN THE COMMISSION'S CASE

The above-entitled matter coming on for consideration, and it appearing that respondents —, —, and —, who are the directors and sole stock owners of the respondent — Education Society, have subsequent to issuance of a complaint against — Education Society and — charging a violation of section 5 of the Federal Trade Commission Act, organized a corporation known as the Standard Encyclopedia Corporation, the said —, —, and — being directors and sole stock owners of the said Standard Encyclopedia Corporation, and it further appearing that the Standard Encyclopedia Corporation is continuing the practices heretofore engaged in by the — Education Society alleged to be unfair methods of

competition in interstate commerce within the intent and meaning of section 5 of the Federal Trade Commission Act;

It is hereby ordered, that the secretary issue a supplemental complaint herein in the manner and form hereto attached, and that the same be served upon respondent — Education Society through counsel by whom its appearance herein was made, upon respondent — through counsel by whom its appearance herein was made, and upon said Standard Encyclopedia Corporation, a corporation, —, and —, now to be added as parties respondent by the service of the said supplemental complaint.

It is further ordered, that the commission's case, heretofore closed, is reopened for the taking of such testimony in support of the supplemental complaint issued herein as the attorney for the commission shall deem necessary.

By order of the commission:

[SEAL]

Secretary.

955. Order to Cease and Desist.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the commission, the answers of the respondents, and the testimony taken and briefs filed herein, and oral argument by the attorney for the commission, and the commission having made its findings as to the facts, with its conclusion that the respondents have violated the provisions of an Act of Congress, approved — —, 19—, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is now ordered, that the respondent, — Education Society, a corporation; Standard Encyclopedia Corporation; —; —; and —, and each of them, their officers, agents, representatives, and employees in connection with the offering for sale of any books, sets of books, or publications in commerce among the several states of the United States or in the District of Columbia, cease and desist from—

(1) Advertising or representing in any manner to purchasers or prospective purchasers that any book or set of books offered for sale and sold by them will be given free of cost to said purchasers or prospective purchasers, when such is not the fact.

(2) Advertising or representing in any manner that a certain number of sets or any set of books offered for sale or sold by them has been reserved to be given away free of cost to selected persons as a means of advertising, or for any other purpose, when such is not the fact.

(3) Advertising or representing in any manner that purchasers or prospective purchasers of respondents' publications are only buying or paying for loose-leaf supplements intended to keep the set of books up-to-date for a period of ten years, when such is not the fact.

(4) Advertising or representing in any manner that respondents' publication is a recently completed, new, and up-to-date encyclopedia, when such is not the fact.

(5) Selling or offering for sale any set of books of the same text and content material under more than one name or title.

(6) Advertising or representing in any manner that the usual price at which respondents' publications are sold is higher than the price at which they are offered in such advertisements or representations, when such is not the fact.

(7) Advertising or representing any person as a contributor to or editor of any set of books or publications who has not performed services in making or preparing contributions to or who has not performed services in the editing of such books or publications and consented that he may be held out to the public as a contributor or as an editor or assistant editor.

(8) Advertising or representing that any person has given testimonials or recommendations for and concerning respondents' publications, when such is not the fact.

(9) Publishing or causing to be published and circulated testimonials or recommendations of and concerning respondents' publications alleged to have been made by any person when such testimonials or recommendations have not been made by such person.

It is further ordered that the respondents, — Education Society, a corporation, —, —, and —, and each of them, their officers, agents, representatives, and employees in connection with the offering for sale of any home study course of instruction in commerce among the several states of the United States or in the District of Columbia do cease and desist from:

(1) Advertising or representing in any manner to purchasers or prospective purchasers as a "Special Introductory Enrollment" and at a specially reduced price, when such is not the fact.

It is further ordered that respondents shall within — days from the date of the service upon them of the order herein file with the commission a report in writing setting forth in detail the manner and form in which the order has been complied with and conformed to.

By the commission:

Secretary.

Source of Form.

From record in Federal Trade Comm. v. Standard Educational Soc., 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

Statutory References.

Modification of order after petition for enforcement, 4 F. C. A., Title 15, § 45

(c); U. S. C. A., Title 15, § 45 (c); id. U. S. C.

Modification of order by commission, 4 F. C. A., Title 15, § 45 (b); U. S. C. A., Title 15, § 45 (b); id. U. S. C.

Report, finding of facts, service of order on parties, 4 F. C. A., Title 15, § 45 (b); U. S. C. A., Title 15, § 45 (b); id. U. S. C.

NOTES TO DECISIONS

In General.

Order should follow complaint and must find support in its averments. Federal Trade Comm. v. Gratz, 253 U. S. 421, 64 L. ed. 993, 40 Sup. Ct. 572, affg. 258 Fed. 314, 11 A. L. R. 793.

Order to desist from "any other equivalent co-operative means of" maintaining fixed prices was too indefinite. Cream of Wheat Co. v. Federal Trade Comm. (C. C. A. 8), 14 Fed. (2d) 40.

Cease and desist order was not indefinite or uncertain. Arkansas Wholesale Grocers Assn. v. Federal Trade Comm. (C. C. A. 8), 18 Fed. (2d) 866.

Order to cease and desist was not too indefinite for purpose of obedience. J. W. Kobi Co. v. Federal Trade Comm. (C. C. A. 2), 23 Fed. (2d) 41.

Order of commission concerning lottery packages of candy was too broad. Words "are designed to" were substituted for "may." Federal Trade Comm. v. McLean (C. C. A. 7), 84 Fed. (2d) 910.

Order directing manufacturer to cease illegal practice was proper though complaint had alleged defendant had conspired with wholesalers and retailers, and no finding of a conspiracy was made and the proceeding was dismissed as to the wholesalers and retailers. Armond Co. v. Federal Trade Comm. (C. C. A. 2), 84 Fed. (2d) 973, den. motion to vacate, 78 Fed. (2d) 707. Cert. den. 299 U. S. 597, 81 L. ed. 440, 57 Sup. Ct. 189. Reh. den. 299 U. S. 623, 81 L. ed. 459, 57 Sup. Ct. 234.

Those parts of an order directing members of voluntary association of rice growers and millers, operating under so-called "Intrastate Marketing Agreement," to cease and desist from fixing and maintaining uniform prices, from compiling, publishing, and distributing joint or uniform list or compilation of prices, and from adopting joint or uniform price list or other price fixing device, and to cease and desist from discussing through the medium of meetings of the association or its marketing and crop boards, or in any other manner, uniform prices, terms, discounts, agreement upon prices by resolution or otherwise, or employing any similar device fixing or tending to fix prices, or which is designed to equalize or make uniform the selling price, terms, or policies, were

valid; that part directing them to cease and desist from fixing or determining the quotas or percentages of the rice crop that the miller may mill or process, which, thereby, unlawfully restricts or hinders the sale of rice or rice products in interstate commerce, was invalid, such fixing or determining of quotas not being commerce, and being intrastate in character. California Rice Industry v. Federal Trade Comm. (C. C. A. 9), 102 Fed. (2d) 716.

Order of commission precluding trading company from using words "army and navy" in its name was too broad in not allowing for use of words in connection with specific goods purchased from army and navy. Federal Trade Comm. v. Army & Navy Trading Co., 66 App. D. C. 394, 88 Fed. (2d) 776.

Finding of Facts.

Facts found by the commission should furnish a sufficient basis for its orders. Heuser v. Federal Trade Comm. (C. C. A. 7), 4 Fed. (2d) 632.

Finding of commission was not sufficient to sustain order to cease and desist "from threatening by letters or otherwise to institute suits, etc." Heuser v. Federal Trade Comm. (C. C. A. 7), 4 Fed. (2d) 632.

If the commission finds that method of competition is prohibited by act, no further finding on question of public interest is required. Hills v. Federal Trade Comm. (C. C. A. 9), 9 Fed. (2d) 481.

Bringing of suit by commission indicates public interest without specific finding of that fact. Moir v. Federal Trade Comm. (C. C. A. 1), 12 Fed. (2d) 22.

The injury resulting from unfair competition need not be expressed in the finding in specific terms of money. Consolidated Book Publishers v. Federal Trade Comm. (C. C. A. 7), 53 Fed. (2d) 942. Cert. den. 286 U. S. 553, 76 L. ed. 1288, 52 Sup. Ct. 579.

Finding that candy manufacturer was conducting a lottery scheme in conjunction with its merchandising supported an order to cease and desist. Federal Trade Comm. v. McLean (C. C. A. 7), 84 Fed. (2d) 910. Cert. den. 299 U. S. 590, 81 L. ed. 435, 57 Sup. Ct. 117.

956. Application for Enforcement of Order of Federal Trade Commission.

United States Circuit Court of Appeals

For the _____ Circuit

_____ Term, 19—.

Federal Trade Commission,

Petitioner,

v.

— Education Society, et al.,

Respondents.

No. —

APPLICATION FOR THE ENFORCEMENT OF AN ORDER OF THE
FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Circuit Court of Appeals for
the — Circuit:

The Federal Trade Commission (hereinafter referred to as the "Commission"), pursuant to the authority conferred upon it by the provisions of an Act of Congress approved September 26, 1914, 38 Stat. 717, 720; (U. S. C., Title 15, section 45), known as the Federal Trade Commission Act, respectfully applies to this Honorable Court for the enforcement of a certain order issued by it on the — day of —, 19— against the respondents: — Education Society, Standard Encyclopedia Corporation, —, —, and —. The proceeding in which said order was entered is known upon the records of the Commission as Docket No. —, the title thereof being "In the matter of Standard Education Society, a corporation; Standard Encyclopedia Corporation; —, individually and as President and Director of Standard Education Society and as President and Director of Standard Encyclopedia Corporation; —, individually and as Director of Standard Encyclopedia Corporation and as Secretary and Director of Standard Education Society; and —, individually and as Director of Standard Encyclopedia Corporation, and as Director of Standard Education Society."

In support of such application, petitioner respectfully shows as follows:

(1) The respondent — Education Society is a corporation organized, existing, and doing business under the laws of —, with its principal place of business located in the city of —, —. The respondent Standard Encyclopedia Corporation is a corporation organized, existing and doing business under the laws of —, with its principal place of business located in the city of —, —. Respondent — is president and general manager, a director, and owner of — shares of the — shares of stock of the — Education Society outstanding, and was an incorporator of and is acting as and has held himself out as president of the respondent Standard Encyclopedia Corporation. Respondent — is secretary, a director, and the owner of — shares of stock in the — Education

Society; he is also a director and was one of the incorporators of the respondent Standard Encyclopedia Corporation. Respondent — is a stockholder in the — Education Society, holding — shares of stock of said corporation, and is now and has been for many years in charge of the financial affairs of said corporation as comptroller, auditor, and manager; and the said — is one of the incorporators of the respondent Standard Encyclopedia Corporation. The respondents —, —, and — are the managers and sole stockholders of the respondent — Education Society and the managers and sole incorporators of respondent Standard Encyclopedia Corporation. Respondents are now and for several years last past have been engaged in the sale and distribution, in interstate commerce, of encyclopedias or reference works, so-called "extension services," and works of fiction, when so sold by them, to be transported in interstate commerce from their said place of business in the state of —, and from other states, to, into, and through states of the United States (including the state of —) other than — and the other states from which they are or have been shipped, to the purchasers thereof.

(2) On — —, 19—, the Commission issued its complaint against the respondent — Education Society and the respondent —, individually and as president thereof, charging the use of unfair methods of competition in interstate commerce in violation of section 5 of said Act of September 26, 1914 (the Federal Trade Commission Act), in offering for sale and selling, in such commerce, said encyclopedias or reference works and said so-called "extension service." Said methods of competition so alleged to be unfair and in violation of said section 5 were in said complaint designated and described fully and in detail.

Said complaint was, on — —, 19—, served upon said respondents — Education Society and —, as required by law. The complaint appears in full in the transcript of the record filed herein.

(3) Thereafter, on — —, 19—, said respondents — Education Society and — filed their respective answers to the said complaint. The answers appear in full in the transcript of the record filed herein.

(4) Thereafter, the matter being ready for trial, testimony and other evidence in support of the charges stated in the complaint and in opposition thereto were adduced by the parties to said proceeding at hearings before examiners of the Commission theretofore duly appointed. Such testimony was reduced to writing and filed, with the other evidence, in the office of the Commission, as required by law.

(5) Thereafter, on — —, 19—, the Commission issued its supplemental complaint against the respondents: — Education Society; Standard Encyclopedia Corporation; —, —, and —, charging the use of unfair methods of competition in interstate commerce in violation of section 5 of said Federal Trade Commission Act. Said methods of competition so alleged to be unfair and in violation of said section 5 were in said supplemental complaint designated and described fully and in detail.

Said supplemental complaint was, on — —, 19—, served upon the several said respondents, as required by law. The supplemental complaint appears in full in the transcript of the record filed herein.

(6) Thereafter, on — —, 19—, the respondents Standard Encyclopedia Corporation, —, and — filed their respective answers to said supplemental complaint; and, on — —, 19—, the respondent — filed an amended answer to the supplemental complaint. Said answers appear in full in the transcript of the record filed herein.

(7) Thereafter, testimony and other evidence in support of the charges stated in the supplemental complaint and in opposition thereto were adduced by the parties to said proceeding before an examiner of the Commission theretofore duly appointed. Such testimony was reduced to writing and filed with the other evidence, in the office of the Commission, as required by law.

(8) Thereafter, a final hearing of said proceeding was had before the Commission upon the record and upon the brief and oral argument of counsel for the Commission and brief of counsel for the respondents (counsel for the respondents not presenting himself for oral argument, although duly notified thereof); and the Commission, having duly considered the record and being fully advised in the premises, and being of the opinion that the methods of competition charged in the said complaint and supplemental complaint were prohibited by said Federal Trade Commission Act, on — —, 19—, made and entered its report in writing, in which it stated its findings as to the facts and its conclusion based thereon; and thereafter, on — —, 19—, the Commission issued, and, on — —, 19—, served upon the respective respondents its order to cease and desist, which, omitting formal parts, reads as follows:

"It is now ordered that the respondents, Standard Education Society, a corporation; Standard Encyclopedia Corporation; —, — and —, and each of them, their officers, agents, representatives, and employees, in connection with the offering for sale of any books, set of books, or publications in commerce among the several States of the United States or in the District of Columbia, cease and desist from—

"(1) Advertising or representing in any manner to purchasers or prospective purchasers that any books or set of books offered for sale and sold by them will be given free of cost to said purchasers or prospective purchasers, when such is not the fact.

"(2) Advertising or representing in any manner that a certain number of sets or any set of books offered for sale or sold by them has been reserved to be given away free of cost to selected persons as a means of advertising, or for any other purpose, when such is not the fact.

"(3) Advertising or representing in any manner that purchasers or prospective purchasers of respondents' publications are only buying or paying for loose-leaf supplements intended to keep the set of books up to date for a period of ten years, when such is not the fact.

"(4) Advertising or representing in any manner that respondents' publication is a recently completed, new, and up-to-date encyclopedia, when such is not the fact.

"(5) Selling or offering for sale any set of books of the same text and content material under more than one name or title.

"(6) Advertising or representing in any manner that the usual price at which respondents' publications are sold is higher than the price at which they are offered in such advertisements or representations, when such is not the fact.

"(7) Advertising or representing any person as a contributor to or editor of any set of books or publications who has not performed service in making or preparing contributions to or who has not performed services in the editing of such books or publication and consented that he may be held out to the public as a contributor or as an editor or assistant editor.

"(8) Advertising or representing that any person has given testimonials or recommendations for and concerning respondents' publications, when such is not the fact.

"(9) Publishing or causing to be published and circulated testimonials or recommendations of and concerning respondents' publications alleged to have been made by any person when such testimonials or recommendations have not been made by such person.

"It is further ordered that the respondents, Standard Education Society, a corporation, —, —, and —, and each of them, their officers, agents, representatives, and employees, in connection with the offering for sale of any home study course of instruction in commerce among the several States of the United States or in the District of Columbia, do cease and desist from:

"(1) Advertising or representing in any manner to purchasers or prospective purchasers that the course of instruction is offered for sale and sold to the purchasers or prospective purchasers as a 'Special Introductory Enrollment,' and at a specially reduced price, when such is not the fact.

"It is further ordered that respondents shall within sixty (60) days from the date of the service upon them of the order herein file with the Commission a report in writing setting forth in detail the manner and form in which the order has been complied with and conformed to."

(9) The said order to cease and desist is still in full force and effect, and has been at all times since its said issuance and service.

(10) Respondents — Education Society, Standard Encyclopedia Corporation, —, —, and — have failed and neglected to obey said order to cease and desist.

(11) The methods of competition employed by said respondents in the proceeding herein, and against which said order to cease and desist was issued, were used by said respondents within the jurisdiction of this court, to wit, within the state of —.

Wherefore, the Commission applies to this Honorable Court for the enforcement of its said order of — —, 19—, and accordingly certifies

and files with this application a transcript of the record in the proceeding before the Commission against the respective respondents named herein.

The Federal Trade Commission Prays this Honorable Court that it cause notice of the filing of this application and transcript to be served upon the respective respondents, and that this court take jurisdiction of the proceeding and of the questions determined therein, and make and enter upon the pleadings and proceedings set forth in such transcript a decree affirming said order of the Commission and commanding the respondents, — Education Society, Standard Encyclopedia Corporation, —, —, and —, and each of them, and their officers, agents, representatives, and employees, to comply therewith.

Chief counsel, Federal Trade Commission.

City of _____, }
District of Columbia. } ss:

—, being first duly sworn, on his oath says that he is the secretary of the Federal Trade Commission, and as such is authorized to make this affidavit on its behalf, and that he makes this affidavit on behalf of such Commission; that he has read the foregoing application and has knowledge of the facts stated therein; and that the statements in the foregoing application are true to the best of his knowledge and belief.

Secretary, Federal Trade Commission.

Subscribed and sworn to before me this — day of —, 19—.

Notary Public.

Source of Form.

From record in Federal Trade Comm. v. Standard Education Soc., 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

Cross-Reference.

See notes to Forms 950, 955, 959.

Statutory Reference.

Petition for enforcement, notice to parties, venue, jurisdiction, 4 F. C. A., Title 15, § 45; U. S. C. A., Title 15, § 45; id. U. S. C.; 7 F. C. A., Title 28, § 225 (e); U. S. C. A., Title 28, § 225 (e); id. U. S. C.

NOTES TO DECISIONS

In General.

In a proceeding for the enforcement of an order made by the commission, the record must contain all the evidence unless the parties agree otherwise. Federal Trade Comm. v. Inecto, Inc. (C. C. A. 2), 70 Fed. (2d) 370.

The court will, without petition by the respondent therefor, first consider the correctness of the order before taking up

the issue of compliance. Federal Trade Comm. v. Standard Education Soc. (C. C. A. 2), 86 Fed. (2d) 692. Revd. on other grounds 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup. Ct. 365.

The court has the power to enforce valid orders of the commission and while the statute does not prescribe any particular type of order apparently it was

the intention of congress that the usual practice adopted by courts of equity in hearing suits for injunction should be utilized. Federal Trade Comm. v. Fairy-foot Products Co. (C. C. A. 7), 94 Fed. (2d) 844.

957. Answer to Application for Enforcement of Order of Commission.

United States Circuit Court of Appeals

— Circuit

Federal Trade Commission,

Petitioner,

v.

— Education Society,

Respondents.

Corporate respondents, — Education Society and Standard Encyclopedia Corporation, and the individual respondents, —, —, and —, by their attorney, —, for their answer to the Federal Trade Commission's application for the enforcement of its order to cease and desist, respectfully allege:

(1) They reiterate and reallege all the allegations contained in their separate answers, now a part of the transcript of record on file in this court, as of the time when issues were joined before the Federal Trade Commission.

(2) Further answering said application, the respondents admit the allegations set forth in petitioner's application, paragraphs 2-8.

(3) Further answering, the respondents deny the allegations set forth in paragraphs 9, 10, and 11.

Wherefore, corporate respondents, — Education Society and Standard Encyclopedia Corporation and the individual respondents, —, —, and — pray that the said application be dismissed and the order to cease and desist herein be vacated and set aside.

Date—.

— Education Society

Standard Encyclopedia Corporation.

Attorneys for respondents.

Source of Form.

From record in Federal Trade Comm. v. Standard Educational Soc., 302 U. S. 112, 82 L. ed. 141, 58 Sup. Ct. 113. Reh. den. 302 U. S. 779, 82 L. ed. 602, 58 Sup.

Ct. 365, revg. (C. C. A. 2), 86 Fed. (2d) 692.

Cross-Reference.

See notes to Forms 950, 955, 956.

NOTES TO DECISIONS

In General.

Where the answer discloses that the order of the commission had not been

complied with, an affirming decree is justified, but where the order is too broad, it will be modified and enforced as modi-

fied. Federal Trade Comm. v. Morrissey (C. C. A. 7), 47 Fed. (2d) 101.

Abandonment of unfair practices against which cease and desist order was issued will not be presumed, and enforcement order will be entered, though respondent pleads that he ceased the activities complained of when the suit was filed. Federal Trade Comm. v. Wallace (C. C. A. 8), 75 Fed. (2d) 733.

Where answer to petition by commission for enforcement of cease and desist order amounts to a demurrer to the commission's finding, the court must accept the findings as conclusive and will presume that they are supported by sub-

stantial evidence. Federal Trade Comm. v. Wallace (C. C. A. 8), 75 Fed. (2d) 733; Federal Trade Comm. v. Maisel Trading Post (C. C. A. 10), 77 Fed. (2d) 246. Mfd. 79 Fed. (2d) 127; E. Griffiths Hughes, Inc. v. Federal Trade Comm. (C. C. A. 2), 77 Fed. (2d) 886. Cert. den. 296 U. S. 617, 80 L. ed. 438, 56 Sup. Ct. 137; Federal Trade Comm. v. Civil Service Bureau (C. C. A. 6), 79 Fed. (2d) 113; Federal Trade Comm. v. Walkers New River Min. Co. (C. C. A. 4), 79 Fed. (2d) 457; Fairyfoot Products Co. v. Federal Trade Comm. (C. C. A. 7), 80 Fed. (2d) 684.

958. Petition for Review of Order of Federal Trade Commission.

To the Honorable Judges of the United States Circuit Court of Appeals for the ——— Circuit:

The petition of your petitioners, above-named, respectfully shows:

I

That each of your petitioners, A Lumber Company, C Fruit Exchange, D-J Lumber Company, F R Lumber Company, H Estate Company, and L Lumber and Box Company, is now, and was during all of the times herein mentioned, a corporation organized and existing under the laws of the state of ———; that each of your petitioners, B L Box Company, E Box Company, and P B Lumber Company, is now, and was during all of the times herein mentioned, a corporation organized and existing under the laws of the state of ———; that your petitioner, D Match Company, is now, and was during all of the times herein mentioned, a corporation organized and existing under the laws of the state of ———; that your petitioner, R R Lumber Company, is now, and was during all of the times herein mentioned, a corporation organized and existing under the laws of the state of ———; that your petitioner, C V Lumber Company, is now, and was during all of the times herein mentioned, a corporation organized and existing under the laws of the state of ———; that each of your petitioners owns and operates certain lumber mills, at which, among other things, forest products are manufactured from that certain tree known botanically as ———; that each of your petitioners now sells, and for many years past continuously has sold, such forest products in interstate and foreign commerce under the commercial name "California white pine."

II

That on the ——— day of ———, 19— respondent, Federal Trade Commission, in certain proceedings entitled severally as follows:

In the matter of A Lumber Company, a corporation, its officers and agents,
Docket No. —.

(Titles of additional proceedings omitted.)

issued its complaints against your petitioners severally, in each of which complaints it was alleged, among other things, that the use by your petitioners of the commercial name "California white pine" for forest products manufactured from — constitutes an unfair method of competition in interstate and foreign commerce in violation of the provisions of section 5 of the Act of Congress approved September 26, 1914, 38 Stat. 717 (U. S. C., Title 15, section 41), commonly known as the Federal Trade Commission Act.

III

That thereafter your petitioners severally filed their answers to the said complaints issued against them respectively, by which answers your petitioners severally admitted that they were engaged in the manufacture of forest products from —, and in the sale of such forest products in interstate and foreign commerce under the commercial name "California white pine," alleged that said commercial name has been in general and continuous use for such forest products for more than forty years past, but denied that such practice was or is in violation of the provisions of section 5 of said Federal Trade Commission Act, and denied other material allegations in said complaints contained.

IV

That thereafter said Federal Trade Commission consolidated the said several proceedings against your petitioners for hearing with certain other proceedings against certain respondents other than your petitioners, and held hearings before a trial examiner appointed by said Federal Trade Commission, and received testimony and other evidence in support of said complaints and in opposition thereto, which said testimony so taken was reduced to writing and filed in the office of said Federal Trade Commission.

V

That thereafter the said trial examiner of the said Federal Trade Commission made and filed his "Trial examiner's report upon the facts" in said proceedings, copies of which said report were served upon your petitioners; that thereafter your petitioners filed with said Federal Trade Commission their exceptions to said "Trial examiner's report upon the facts"; that thereafter briefs were filed with the Commission in said proceedings by the attorney for the Federal Trade Commission and by the attorneys for your petitioners and each of them; that thereafter these several causes came on for oral argument before the said Commission

and following such argument were taken under submission by the said Commission.

VI

That thereafter, on the — day of —, 19—, said Commission issued in each of said proceedings a purported "Report, findings as to the facts, and conclusions," together with a purported "Order to cease and desist"; that said orders to cease and desist are directed severally against your petitioners, and each of them, their officers, agents, representatives, and employees; that said orders are in identical terms, except that each is directed against a specifically named respondent; that the order directed against your petitioner A Lumber Company is in the words and figures following, to wit:

"It is now ordered that the A Lumber Company, a corporation, its officers, agents, representatives and employees, in connection with the advertising, offering for sale and/or sale, in commerce among the several States of the United States, or with foreign countries, of lumber, logs or other forest products made from the pine species known as *Pinus ponderosa*, which have been designated by respondent in its trade as 'California white pine' products, do cease and desist from using, either orally or in writing, the word 'white' in connection, combination, or conjunction with the word 'pine,' or in connection with other word or words used in combination or conjunction with the word 'pine.'

"And it is further ordered, that the said respondent, within sixty (60) days from the receipt of this order, shall file with the Commission its report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth."

VII

That the said "Report and findings as to the facts" of said Commission in each of said proceedings are, in material and controlling respects, without support in the evidence received by the said Commission in said proceedings, but are contrary to such evidence; that said "Conclusion" of said Commission in each of said proceedings is not supported by the findings or by the evidence received by the said Commission; that each of the said several orders entitled "Order to cease and desist," so made by the said Commission against your petitioners severally, is not supported by the record before the said Commission in said proceedings and is beyond the authority and jurisdiction of said Commission.

VIII

That in making, entering, and publishing its said several "Orders to cease and desist" the said Federal Trade Commission erred in concluding that the use by your petitioners of the commercial name "California white

pine" in selling forest products manufactured from said — in interstate and foreign commerce is "an unfair method of competition in interstate commerce" in violation of the provisions of section 5 of said Federal Trade Commission Act.

IX

That no proof was adduced in said proceeding before the said Federal Trade Commission showing or tending to show that your petitioners have, or that any of them has, committed any act or acts, or engaged in any practice or practices prohibited by the provisions of section 5 of said Federal Trade Commission Act, or that your petitioners have, or that any of them has, committed any other act or engaged in any other practice cognizable by the said Federal Trade Commission under the said Federal Trade Commission Act, or warranting the issue by said Commission of its said several "Orders to cease and desist"; that under the proofs adduced before said Federal Trade Commission in said proceedings the said Commission was without authority or jurisdiction to enter any order respecting your petitioners, or any of them, other than an order or orders dismissing its said several complaints.

X

That the said Federal Trade Commission erred in taking or purporting to take jurisdiction over your petitioners, or any of them, by the issuance of its said respective "orders to cease and desist"; that the said several "Orders to cease and desist" are, and each of them is, erroneous, contrary to law, and wholly void.

Wherefore, your petitioners respectfully pray:

1. For a review by this honorable court of the said "Orders to cease and desist" and of each thereof heretofore made and entered by said Federal Trade Commission in said proceedings;
2. For an order of this court directing the Federal Trade Commission, upon being served with a copy of this petition, forthwith to certify and file in this court a transcript of the entire record in the said proceedings heretofore had by and before the Federal Trade Commission, including the said several complaints, the said several answers, the said "Trial examiner's report upon the facts," and the said several "Reports, findings as to the facts, and conclusions" and "Orders to cease and desist";
3. For an order permitting a brief or briefs to be filed herein on behalf of your petitioners and fixing the time for filing the same;
4. For an order permitting oral argument to be had herein on behalf of your petitioners and fixing the time for the same;
5. For a judgment vacating and setting aside the said orders of the Federal Trade Commission to cease and desist, and requiring a dismissal of said proceedings, and each of them, by the Federal Trade Commission;

6. For such other orders and relief as may be proper in the premises.

Attorney for petitioners.

Date ____.

Subscribed and sworn to before me this ____ day of ____, 19__.

Name.

Official character.

Source of Form.

From record in Federal Trade Comm. v. Algoma Lbr. Co., 291 U. S. 67, 78 L. ed. 655, 54 Sup. Ct. 315.

Cross-Reference.

See notes to Forms 950, 955.

Statutory Reference.

Petition for review, notice, jurisdiction, 4 F. C. A., Title 15, § 45 (c); U. S. C. A., Title 15, § 45 (c); id. U. S. C.; 7 F. C. A., Title 28, § 225 (e); U. S. C. A., Title 28, § 225 (e); id. U. S. C.

NOTES TO DECISIONS

In General.

Objection that complaint is insufficient may be first raised in court on application to set order aside. *American Tobacco Co. v. Federal Trade Comm.* (C. C. A. 2), 9 Fed. (2d) 570. Affd. 274 U. S. 543, 71 L. ed. 1193, 47 Sup. Ct. 663.

Issues not before the commission will not be considered. *Raladam Co. v. Federal Trade Comm.* (C. C. A. 6), 42 Fed. (2d) 430. Affd. 283 U. S. 643, 75 L. ed. 1324, 51 Sup. Ct. 587, 79 A. L. R. 1191.

In proceedings to review cease and desist order of commission, a motion to strike the transcript is not the manner in which to bring before the court question as to whether persons against whom the order was directed were denied a fair trial in that the hearing was so directed by the examiner as not to allow them to make a record of matters properly includible in the record. *California Lumbermens Council v. Federal Trade Comm.* (C. C. A. 9), 103 Fed. (2d) 304.

Where allegations of complaint that petitioner shipped products subject to commission's order in interstate commerce were expressly admitted by petitioner, they were unimpeachable in proceedings to review cease and desist order. *National Candy Co. v. Federal Trade Comm.* (C. C. A. 7), 104 Fed. (2d) 999.

Upon review of cease and desist order, petitioner's failure to deny, and its ex-

press admissions of the allegations of the complaint, waived all questions except the sufficiency in law of the allegations of the complaint. *National Candy Co. v. Federal Trade Comm.* (C. C. A. 7), 104 Fed. (2d) 999.

Report of Trial Examiner.

Findings of trial examiner in his report to commission need not be included in the record for review. *Raladam Co. v. Federal Trade Comm.* (C. C. A. 6), 42 Fed. (2d) 430. Affd. 283 U. S. 643, 75 L. ed. 1324, 51 Sup. Ct. 587, 79 A. L. R. 1191. See *A. D. Cummins & Co. v. United States*, 283 U. S. 858, 75 L. ed. 1464, 51 Sup. Ct. 652.

Commission is not required to certify as a part of the record the report of the examiner or the exceptions thereto unless such report and exceptions are referred to in findings of the commission and thereby adopted by it as its findings. *Algoma Lbr. Co. v. Federal Trade Comm.* (C. C. A. 9), 56 Fed. (2d) 774.

The trial examiner's report upon facts or the petitioner's exceptions thereto are not a part of the record in a proceeding to review an order of the commission, and may be properly stricken therefrom. *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm.* (C. C. A. 2), 63 Fed. (2d) 108.

959. Order Allowing Filing of Petition for Review.

(Title.)

The petitioners above-named having presented to this court a petition for a review of and to set aside certain orders of respondent, Federal Trade Commission, issued on — —, 19—, in certain proceedings theretofore instituted by respondent against said petitioners, and it appearing that said petitioners are entitled to have said orders reviewed by this court, and for that purpose to file said petition with this court, and to have a transcript of the entire proceedings had therein by and before respondent, Federal Trade Commission, filed in this court,

Now, therefore, it is hereby ordered, that petitioners herein be, and they are hereby, allowed and given consent to file said petition with the clerk of this court, and to have said action docketed and placed on the calendar in accordance with the rules and practice of this court for the purpose of a review of said orders of respondent as provided by law, and

It is further ordered, that respondent, Federal Trade Commission, shall be, and it is hereby, directed and ordered to prepare, certify, and file with the clerk of this court, within — days from this date, a complete transcript of said entire proceedings had by and before respondent, including the several complaints, the several answers, the "Trial examiner's report upon the facts," and the reports and orders of said commission in such proceedings; and that a certified copy of the said petition for a review of such orders be served forthwith upon respondent, Federal Trade Commission, by the clerk of this court, and

It is hereby further ordered, that both petitioners and respondent, Federal Trade Commission, as the respective parties herein, shall be, and they are hereby, accorded the right and privilege of filing briefs and being heard in oral argument by counsel in accordance with the rules of practice and procedure of this court.

Dated this — day of —, 19—.

United States Circuit Judge.

United States Marshal's Office,

_____, _____
_____, 19—.

Served copy of the within order, together with a copy of the petition and a copy of an order of the United States Circuit Court of Appeals for the — Circuit waiving the printing of the record on —, Secretary of the Federal Trade Commission, in person on — —, 19—.

United States Marshal, District of Columbia.

By _____
Deputy marshal.

Source of Form.

From record in Federal Trade Comm.
v. Algoma Lbr. Co., 291 U. S. 67, 78 L.
ed. 655, 54 Sup. Ct. 315.

Cross-Reference.

See notes to Form 958.

CHAPTER 29

FEDERAL COMMUNICATIONS COMMISSION

Form

965. Petition for rehearing.

966. Affidavit of service.

967. Notice of appeal.

Form

968. Reasons for appeal.

969. Notice of intention to intervene.

INTRODUCTION.—The Federal Communications Commission, composed of seven commissioners appointed by the President with the advice and consent of the Senate, was created by an Act of Congress approved June 19, 1934, which is known as "The Communications Act of 1934." The purposes of the act are to regulate interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient nation-wide and world-wide wire and radio communication service, with adequate facilities at reasonable charges; for the national defense; and to promote safety of life and property through the use of wire and radio communication.

Prior to the passage of the Communications Act of 1934, the duties and functions relating to the regulation of interstate and foreign commerce in wire and wireless were vested in the Interstate Commerce Commission, the Federal Radio Commission, the Post-Office Department, and the Department of State. General regulatory powers over wire communication carriers were vested in the Interstate Commerce Commission by the Act of June 18, 1910 (36 Stat. 539). The Radio Act of 1927 (44 Stat. 1162) established the Federal Radio Commission and gave that organization broad powers and duties with respect to the issuance and refusal of licenses, the establishment of radio facilities, and the regulation thereof. No authority, however, was given the Federal Radio Commission over rates. The Postmaster General was authorized under the Post Roads Act of 1866 (14 Stat. 221) to fix rates for government telegraphs. The State Department was authorized by Executive Order No. 3513, July 9, 1921, which order was issued pursuant to an Act of Congress approved May 27, 1931 (42 Stat. 8), to receive all applications to land or operate submarine cables in the United States and to advise the President with respect to the granting or revocation of such licenses. Jurisdiction over the matters vested in the several agencies hereinabove set forth is now vested in the Federal Communications Commission.

965. Petition for Rehearing.

Before the
Federal Communications Commission
Washington, D. C.

In the Matter of
— Broadcasting Corporation,
—, —.

} Docket No. —
For Construction Permit

PETITION FOR REHEARING

Now comes the — Broadcasting Corporation, applicant for a construction permit for a new station at — and pursuant to section 405 of the Communications Act of 1934 and section 1.271 of the Rules of Practice and Procedure of the commission requests that the commission rehear its action of — denying the application of petitioner upon the ground that said action is unjust, unwarranted, and erroneous for the following reasons:

1. The commission's decision and order denying petitioner's application is not supported by essential and basic findings of fact, in this, to wit: First. The evidence of record does not support the commission's conclusion that the applicant is not financially qualified, but on the contrary shows beyond a doubt that the applicant is financially qualified to construct and operate the proposed station; second, the evidence of record upon which the commission relied in support of this conclusion was submitted and introduced by witnesses of intervener in the proceeding and was of a conflicting and contradictory nature and is entitled to no weight for that reason. This evidence was as follows: [Brief statement of evidence relied upon as conflicting and contradictory].

The applicant, on the other hand, introduced evidence which was uncontradicted and undisputed, which apparently was not considered by the commission and which, if considered, would support a determination that the applicant is financially qualified to construct and operate the proposed station. This evidence was as follows: [Here set forth evidence relied upon which would support determination that applicant is financially qualified].

2. Although the evidence recited by the commission in support of its conclusion that Richard Roe and John Doe, directors, officers, and stockholders of the applicant are not citizens of the United States might, if there were no other evidence in the record on this issue, support such conclusion, the record shows the following undisputed evidence of record, which was apparently overlooked by the commission, showing that such persons are citizens of the United States: [Here set forth evidence relied upon which would support conclusion that Richard Roe and John Doe are citizens].

Furthermore, the attached memorandum of law, containing a citation of authorities shows that the commission's conclusion as to the citizenship of Richard Roe and John Doe was based upon an erroneous construction of

the statute relied upon by the commission in its decision, that the facts in the record relied upon by the commission in support of this conclusion were not pertinent to the issue of citizenship, but that on the contrary the evidence in the record relied upon by applicant and set forth above is pertinent to this issue and are legally sufficient to establish the citizenship of Richard Roe and John Doe.

Wherefore, the petitioner respectfully requests that the commission:

1. Set aside its findings, conclusions and order of —, denying the above-entitled application and reconsider its action in the light of the matters set forth above, review the evidence, and grant the said application; or in the alternative

2. Set aside the aforesaid findings, conclusions, and order and grant reargument on the record as made on the issue of citizenship.

Respectfully submitted,

— Broadcasting Corporation.

By —

Counsel.

Statutory References.

Application for rehearing, procedure, time for application, 10 F. C. A., Title 47, § 405; U. S. C. A., Title 47, § 405; id. U. S. C.

Definition, 10 F. C. A., Title 47, § 153; U. S. C. A., Title 47, § 153; id. U. S. C.

General powers, duties, and jurisdiction of commission, 10 F. C. A., Title 47, §§ 154, 155, 301 to 312; U. S. C. A., Title 47, §§ 154, 155, 301 to 312; id. U. S. C.

Rules and regulations, 10 F. C. A., Title 47, § 154 (i); U. S. C. A., Title 47, § 154 (i); id. U. S. C.

966. Affidavit of Service.

STATE OF —, }
COUNTY OF —. } ss:

Mary Roe, having been duly sworn deposes and says that on the — day of —, she sent by registered mail, postage prepaid, a true copy of the foregoing "Petition for Rehearing" to John E. Doe, attorney for the — Radio Corporation, [address].

Mary Roe.

Subscribed and sworn to before me this — day of —, 19—.

Notary public.

967. Notice of Appeal.

United States Court of Appeals for the District of Columbia

— Broadcasting Corporation,
Appellant,

v.

Federal Communications Commis-
sion,

Appellee.

No. —

NOTICE OF APPEAL

Now comes the — Broadcasting Corporation this — day of —, 19—, pursuant to section 402 (c) of the Communications Act of 1934 as amended, and gives this notice of appeal from the decision and order of the commission dated — —, 19—, effective — —, 19—, denying its application for construction permit to erect a new radiobroadcast station at —, to operate on the frequency of — kc with — power, — time.

— Broadcasting Corporation,
By —
Attorney for appellant.

Cross-Reference.

See notes to Form 770.

968. Reasons for Appeal.

United States Court of Appeals for the District of Columbia

— Broadcasting Corporation,
Appellant,
v.
Federal Communications Commis-
sion,
Appellee.

No. —

REASONS FOR APPEAL

Now comes the — Broadcasting Corporation this — day of —, 19—, and points out that it is an applicant for a construction permit for a radio station whose application was refused by the commission by decision and order dated — —, 19—, effective — —, 19—; that subsequent to said decision and order appellant filed a petition for rehearing with the commission pursuant to section 405 of the Communications Act of 1934, as amended, which petition was denied by the commission by order dated — —, 19—, effective — —, 19—, and pursuant to section 402 (c) assigns the following reasons for this appeal:

1. The commission's decision and order of — —, 19—, effective — —, 19—, denying appellant's application for construction permit for a radio station is illegal because: First. Said order was adopted by the commission without giving appellant an opportunity to be heard on the application for construction permit for radio station which was denied thereby, second, since no notice was given to the appellant of the reason for the denial of its application and no opportunity was afforded appellant to be heard thereon before the commission entered its decision denying said application.

2. The decision of the commission that appellant was not qualified under the Communications Act of 1934, as amended, to receive a construc-

tion permit to erect a radio station on the ground that appellant is not a citizen of the United States is arbitrary and capricious because it is not based upon any evidence and is contrary to the evidence submitted by appellant to the commission.

3. The denial of appellant's application on the ground that a grant thereof would not be in the public interest, convenience, and necessity because the proposed station would not be able to serve the entire community of — is arbitrary and capricious because the evidence submitted by appellant to the commission proves that the proposed station would in fact serve the entire community of —. In any event, this reason for the denial of appellant's application is not a lawful reason for the commission's action under the circumstances of this case.

PRAYER

Wherefore, appellant prays that this court hear and determine this appeal and enter judgment reversing the decision of the commission denying appellant's application for construction permit, and remand the case to the commission to carry out the judgment of the court.

— Broadcasting Corporation
By _____
Attorney for appellant.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Notice of Appeal" and "Statement of Reasons" acknowledged and a true copy thereof received this — day of —, 19—.

Federal Communications Commission.
By _____

Statutory References.

Injunction, 7 F. C. A., Title 28, § 47; U. S. C. A., Title 28, § 47; id. U. S. C.

Jurisdiction of courts, 7 F. C. A., Title 28, §§ 44, 46; U. S. C. A., Title 28, §§ 44, 46; id. U. S. C.; 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C.

Motion to dismiss answer or petition, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.

No replication to answer required, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.

Petition, form and service thereof, 7 F. C. A., Title 28, § 45; U. S. C. A., Title 28, § 45; id. U. S. C.; 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C.

Procedure, 7 F. C. A., Title 28, §§ 44, 45, 45a, 47, 47a, 48; U. S. C. A., Title 28, §§ 44, 45, 45a, 47, 47a, 48; id. U. S. C.; 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C.

Venue, 7 F. C. A., Title 28, § 43; U. S. C. A., Title 28, § 43; id. U. S. C.; 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C.

NOTES TO DECISIONS

In General.

One appealing from an order of the commission must state his assignment of error, and nature of petitioner's grievance and his appealable interest. Mis-

souri Broadcasting Corp. v. Federal Communications Comm., 68 App. D. C. 154, 94 Fed. (2d) 623. Cert. den. 303 U. S. 655, 82 L. ed. 1115, 58 Sup. Ct. 759.

The language of 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C. implies that there shall be a public hearing, that evidence shall be taken and preserved, and that this court shall have jurisdiction to deny effect to an order made without supporting evidence or wherever the hearing or decision is inadequate, unfair, or arbitrary. *Missouri Broadcasting Corp. v. Federal Communication Comm.*, 68 App. D. C. 154, 94 Fed. (2d) 623. *Cert. den.* 303 U. S. 655, 82 L. ed. 1115, 58 Sup. Ct. 759.

"Statement of facts and grounds for decision" stated and examined and held insufficient to constitute findings of facts such as are contemplated by 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C. *Heitmeyer v. Federal Communication Comm.*, 68 App. D. C. 180, 95 Fed. (2d) 91.

One appealing from a decision of the commission must bring itself with the requirements of 10 F. C. A., Title 47, § 402; U. S. C. A., Title 47, § 402; id. U. S. C. *Pittsburgh Radio Supply House v. Federal Communications Comm.*, 69 App. D. C. 22, 98 Fed. (2d) 303.

969. Notice of Intention to Intervene.

United States Court of Appeals for the District of Columbia

ABC Broadcasting Corporation,
Appellant,
v.
Federal Communications Commis-
sion,
Appellee.

No. —

Now comes QED Broadcasting Corporation, permittee of Station —, —, —, and pursuant to section 402 (d) of the Communications Act of 1934, states that it is entitled to participate in the proceedings to be had upon the above-entitled appeal and hereby gives notice that it intends to intervene therein for the reasons hereinafter set forth.

QED Broadcasting Corporation.

By _____
Its attorney.

VERIFIED STATEMENT OF INTERVENER'S INTEREST

District of Columbia, } ss:
City of —.

John Doe, being first duly sworn, says that he is attorney for QED Broadcasting Corporation and that notice of intention to intervene in the above-entitled appeal of ABC Broadcasting Corporation has been duly filed and that intervenor's interest is as follows:

1. QED Broadcasting Corporation is a — corporation organized for the purpose of constructing and operating a broadcasting station in —, —, and with its principal place of business at —, —;
2. By an order dated — —, 19—, effective — —, 19—, the Federal Communications Commission granted the application of QED Broadcasting Corporation, intervenor herein, authorizing it to construct

and operate a new broadcasting station in —, —, on the frequency — kilocycles, with — watts power, — time;

3. ABC Broadcasting Corporation, appellant herein, requests in its Notice of Appeal and Statement of Reasons therefore that the said decision and order of the commission be reversed and that the authorization of a construction permit to intervener be set aside;

4. The reversal of said decision and order of the commission would preclude intervener from constructing its station as authorized in the public interest, convenience, and necessity and would deprive it of such rights as it has acquired under the terms of the permit.

John Doe.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this — day of —, 19—.

[SEAL]

Notary public.

My commission expires — —, 19—.

Statutory Reference.

Intervention, 10 F. C. A., Title 47,
§ 402; U. S. C. A., Title 47, § 402; id.
U. S. C.

CHAPTER 30

SECURITIES AND EXCHANGE COMMISSION

Form

- 975. Petition for review of stop order of Securities and Exchange Commission.
- 976. Order granting petition for review.
- 977. Petition for review of determination by commission denying application for confidential treatment.
- 978. Notice of petition for review.

Form

- 979. Order granting leave to file petition for review in Circuit Court of Appeals.
- 980. Complaint in action by the Securities and Exchange Commission to enjoin sale of unregistered securities.
- 981. Answer to complaint in action by Securities and Exchange Commission to enjoin sale of unregistered securities.

INTRODUCTION.—The Securities and Exchange Commission was created under authority of the Act of June 6, 1934 (48 Stat. 881), known as the "Securities Exchange Act of 1934." It was charged with the administration of that act, and to it was transferred the administration of the Securities Act of 1933, previously administered by the Federal Trade Commission. The functions and powers of the commission were further augmented by the Public Utility Holding Company Act of 1935, the Chandler Act of 1938, and the Trust Indenture Act of 1939.

The functions of the commission fall into four groups: First. Supervision of registration of security issues, qualification of trust indentures, and the suppression of fraudulent practices in the sale of securities under the Securities Act of 1933, and the Trust Indenture Act of 1939 (an amendment of the Securities Act); second, the supervision and regulation of transactions and trading in outstanding securities, both on the stock exchanges and in the over-the-counter markets, as provided by the Securities Exchange Act of 1934, as amended; third, regulation of public utility holding companies as provided in the Public Utility Act of 1939; fourth, participation as a party, and, under certain circumstances, reporting to bankruptcy courts on reorganization plans, in proceedings under chapter 10 of the Chandler Act of 1938.

The primary purpose of the commission in respect of the Securities Act and the Securities Exchange Act is to compel the truthful disclosure of material facts concerning securities publicly sold or traded in on securities exchanges or over-the-counter markets. The 1934 act also provides for the regulation of exchanges, dealers, and brokers for the purpose of preventing manipulation of security prices.

The Public Utility Holding Company Act, on the other hand, provides generally for affirmative regulation of the various activities of, and the simplification of, holding company systems.

Under each of these acts the commission has the power to institute injunctive proceedings in the courts and also the process of subpoena and investigation. There is a right of review by the Circuit Courts of Appeals in respect of certain orders of the commission.

All three acts provide civil liabilities and criminal penalties for various types of violations.

975. Petition for Review of Stop Order of Securities and Exchange Commission.

United States Circuit Court of Appeals for the — Circuit		
— Trust, an Express Trust,	}	
Petitioner,		
v.		
Securities and Exchange Commis-		
sion,		No. —
Respondent.		

PETITION FOR REVIEW

To the judges of the United States Circuit Court of Appeals, for the — Circuit:

Your petitioner, — Trust, respectfully represents and shows to this honorable court:

I

That — Trust is an express trust, commonly known as a business or common-law trust, created under and by virtue of the laws of the state of —, particularly of the Act of March 22, 1919, being chapter 16 of the 1919 Session Laws of the state of — (now sections 11820-11823, O. S. 1931), with its principal place of business at — Building, —, —, all within the — Circuit.

That the trustees of — Trust are —, —, —, and —, and that all of said trustees are citizens and residents of —, —, and all of said trustees have their principal places of business at —, —, within said circuit.

II

The respondent, Securities and Exchange Commission, is a commission established under section 4 (a) of Title I of a statute of the United States for the regulation of securities exchanges, known as the Securities Exchange Act of 1934, approved June 6, 1934.

III

That by section 9 (a) of Title I of the Securities Act of 1933, approved May 27, 1933, jurisdiction is vested in this honorable court to review any order of the Securities and Exchange Commission upon the petition of any person aggrieved by any order made by said commission.

IV

Heretofore on or about the — day of —, 19—, — Trust, your petitioner, by and through its trustees, duly filed with the Securities and Exchange Commission its registration statement on Form A-1, being the form provided for by said Securities Act of 1933, and by the rules and regulations of the Securities and Exchange Commission, made by said commission pursuant to said act, and that said registration statement by said commission was given File No. —.

V

That thereafter and during the month of —, 19—, amendments were filed to the registration statement, which said amendments were in the form provided by the rules and regulations of the Securities and Exchange Commission and were by said commission accepted as amendments to said registration statement.

VI

That thereafter, in accordance with the provisions of the Securities Act of 1933, and in accordance with the rules and regulations of the Securities and Exchange Commission, the said registration statement, as amended, became effective under and by virtue of and pursuant to section 8 (a) of Title I of the Securities Act of 1933.

VII

That prior to the effective date of said registration statement, as amended, your petitioner, in accordance with the provisions of the Securities Act of 1933, and pursuant to the rules and regulations of the Securities and Exchange Commission, filed with the Securities and Exchange Commission a prospectus, dated to become effective — —, 19—, and that said prospectus was accepted by said commission as and for the prospectus of your petitioner based upon the contents of the registration statement, as amended, which became effective on — —, 19—.

VIII

That thereafter on — —, 19—, the Securities and Exchange Commission, pursuant to the provisions of section 8 (d) of the Securities Act of 1933, gave telegraphic notice, in which notice it was charged that it

appeared that the registration statement contained untrue statements of material facts and omitted to state material facts required to be stated therein and material facts necessary to make the statements therein not misleading, with respect to — items named in said telegraphic notice, and with respect to — exhibits and the prospectus.

IX

That pursuant to the aforesaid notice, a hearing was duly begun on — —, 19—, before a Trial Examiner of the Securities and Exchange Commission, and at said hearing and at subsequent hearings evidence was introduced in support of said charges by the Securities and Exchange Commission, and evidence was introduced in denial and refutation of said charges by your petitioner. That after said evidence had been introduced the Securities and Exchange Commission and your petitioner, by and through their respective attorneys, made and filed with the Trial Examiner a request for findings, in accordance with Rule VIII (e) of the Rules of Practice of the Securities and Exchange Commission, and that thereafter the Trial Examiner made and filed with the Securities and Exchange Commission his findings, report, and recommendations. That thereafter the Securities and Exchange Commission and your petitioner, by and through their respective attorneys, filed with the Securities and Exchange Commission exceptions to the findings, report, and recommendations of the Trial Examiner, and that each of said parties filed their briefs in support of their respective positions, and after oral arguments the said findings, report, and recommendations of the Trial Examiner, and the said cause were submitted to said commission, and the said commission, on — —, 19—, made and entered its findings and opinion and made and entered its stop order, suspending the effectiveness of the registration statement.

X

Your petitioner further represents and shows that there were errors in the proceedings before the examiner and errors by the Securities and Exchange Commission, and that said errors are as hereinafter set out, to wit:

* * *

(e) Your petitioner further represents and shows that in said order of — —, 19—, the Securities and Exchange Commission, by its findings and opinion and its order, held and found that the answer of your petitioner in the registration statement to the matter relating to quarterly reports was misleading, and your petitioner represents that said finding is not supported by the evidence, that the matter of quarterly reports is not material and is immaterial, and that the findings relating thereto are contrary to law, and that your petitioner is aggrieved by said findings and prays a review thereof by this court in the manner provided by law.

* * *

(h) Your petitioner further represents and shows that by the findings and opinion and order of — —, 19—, the Securities and Exchange Commission found that the estimates of ultimate future recovery of oil and gas from the properties were deficient and, by said findings, opinion, and order, treated said estimates of future recovery as statements of fact, and that said findings, opinion and order with respect thereto are not supported by the evidence, are contrary to law and without warrant of law, and that your petitioner is aggrieved thereby and prays a review thereof by this court in the manner provided by law.

* * *

(k) Your petitioner further represents and shows and says that each, all and every of the findings of the commission, as set forth in its findings and opinion of — —, 19—, is without warrant of law and is contrary to law, that no part of said findings is supported by the evidence, that the Securities and Exchange Commission was without jurisdiction or authority to make any order, except to dismiss said proceedings or to permit the withdrawal by your petitioner of the registration statement, and your petitioner says that it is aggrieved by each, every, and all of the findings set forth in the findings and opinion of the commission and is aggrieved by its order and prays a review of each and every part of said order and of the findings and opinion upon which said order is based.

XI

Your petitioner further represents and shows that the examiner, in making his findings, report, and recommendations to the Securities and Exchange Commission, and that the Securities and Exchange Commission, in making its findings and opinion, and issuing its stop order, considered and relied upon evidence which was incompetent, immaterial, and irrelevant and which was introduced into the record and allowed to become a part of the record, after objection made by your petitioner, and to which ruling so admitting said evidence, both oral and written exhibits, your petitioner at the time saved exceptions, and that said examiner and said Securities and Exchange Commission considered incompetent, immaterial, and irrelevant evidence in the record, which your petitioner had moved to strike from the record in the proceedings before the examiner, and to which, and to the overruling of which motion to strike, the petitioner saved its several exceptions, and that the errors complained of in the admission of evidence and in the overruling of motions to strike evidence are as follows: [Here insert].

XII

That the Securities Act of 1933, as amended by the Securities Exchange Act of 1934, embraces a subject-matter not delegated by the Constitution of the United States to the jurisdiction of the congress, that said act is violative of the Constitution of the United States and is void by reason of such violation, and that any and all proceedings purporting to have

been taken by the Securities and Exchange Commission herein under the authority of said law are without warrant of law. That no act of your petitioner in and about the sale of said securities constituted commerce among the several states, and that the provisions of said act are not a regulation of commerce among the several states, that the business of your petitioner in and about the sale of said securities was and is not against public policy, and that the attempted denial of your petitioner of the use of the mails in a legitimate business, as attempted by the act, is illegal, without warrant of law and void.

Wherefore, the premises considered, your petitioner prays that this honorable court:

(a) Specifically order that the filing of this petition shall operate as a stay of the order of the commission so made on — —, 19—;

(b) That a copy of this petition be forthwith served upon the commission by serving any member thereof, or by service upon the secretary of the commission, and that upon such service the Securities and Exchange Commission be required to file in this court a full, true, complete, and correct transcript of the record upon which the order complained of was entered;

(c) That this court review, annul, and set aside said opinion and findings of the Securities and Exchange Commission of — —, 19—, that it review, annul, and set aside the stop order of — —, 19—, suspending the effectiveness of the registration statement of your petitioner, and that this court hold said order void and of no effect;

(d) That it grant such other and further relief in the premises as to your honorable court shall seem meet and proper.

— Trust,
An express trust.

By ———
Its president.

STATE OF ———, }
COUNTY OF ———. } ss:

—, being first duly sworn on oath, deposes and says that he is president of the — Trust, an express trust, the within-named petitioner; that he is duly authorized to execute the foregoing petition in behalf of said — Trust; that he has read the foregoing petition, is familiar with the contents thereof, and that the statements therein contained are true as he verily believes.

Subscribed and sworn to before me, a notary public, this — day of —, 19—.

[SEAL]

My commission expires — —, 19—.

Notary public.

Attorney for petitioner.

Source of Form.

From record in Oklahoma-Texas Trust v. Securities & Exch. Comm. (C. C. A. 10), 100 Fed. (2d) 888.

Statutory References.

Definitions, 4 F. C. A., Title 15, §§ 77 (b), 78 (c); U. S. C. A., Title 15, §§ 77 (b), 78 (c); id. U. S. C.

Petition for review by courts, jurisdiction, venue, service of process, transcript of record before commission, 4 F. C. A.,

Title 15, § 77 (i); U. S. C. A., Title 15, § 77 (i); id. U. S. C.

Powers and duties of Federal Trade Commission under Securities Act of 1933 transferred to Securities and Exchange Commission, 4 F. C. A., Title 15, § 78 (ii); U. S. C. A., Title 15, § 78 (ii); id. U. S. C.

Registration of securities, stop orders, 4 F. C. A., Title 15, § 77 (h); U. S. C. A., Title 15, § 77 (h); id. U. S. C.

976. Order Granting Petition for Review.

On the — day of —, 19—, there is presented to me, the undersigned, a judge of the United States Circuit Court of Appeals for the — Circuit, the duly verified petition of — Trust, filed in this court on the — day of —, 19—, against the Securities and Exchange Commission, praying for a review of an order of the Securities and Exchange Commission, made and entered by said commission, on — —, 19—, in a matter pending before said commission styled "In the Matter of the Registration Statement of the — Trust, file 2-1808," and it appearing that said petition has been filed as provided in section No. 9 (a) of the Securities Act of 1933, and within the time therein provided:

It is ordered, that a copy of said petition, with a notice of the filing thereof, and a copy of this order duly certified by the clerk of this court, be served on the Securities and Exchange Commission, which service may be made on the secretary of said commission, or on a member thereof.

It is further ordered, that within — days from the date of service of said petition and of this order upon the Securities and Exchange Commission, as herein provided, that said commission shall certify and file in this court a transcript of the record upon which the order complained of was entered which transcript shall include:

1. The docket entries of proceedings before the commission.
2. All pleadings filed with and before the commission, including notices and motions with the data, or documents accompanying said motions and notices, if any.
3. Findings and opinion of the commission and the order entered thereon.
4. The evidence taken in said cause and the exhibits thereto.
5. Any and all other documents although not specifically mentioned herein, upon which the findings and opinion was made and the order was entered, considered by the commission in connection with the matter before it.

It is ordered, that the time for the certification and filing in this court of the transcript of the record as herein provided may be enlarged by a judge of this court, upon application therefor and for good cause shown.

Witness my hand, as judge of the — Circuit Court of Appeals, this
— day of —, 19—.

United States Circuit Judge.

Filed — —, 19—. —, Clerk.

Source of Form.

From record in Oklahoma-Texas Trust
v. Securities & Exch. Comm. (C. C. A.
10), 100 Fed. (2d) 888.

Cross-Reference.

See notes to Form 975.

**977. Petition for Review of Determination by Commission Denying
Application for Confidential Treatment.**

United States Circuit Court of Appeals

— Circuit

— Manufacturing Company, Inc.,
Petitioner,
v.
Securities and Exchange Commis-
sion.

No. —

To the honorable, the judges of the United States Circuit Court of Appeals
for the — Circuit:

The petition of the — Manufacturing Company, Inc., respectfully
represents:

I

The petitioner is a corporation organized and existing under the laws
of the state of —, and has its principal office and place of business in the
county of —, in the — District of —.

II

The Securities and Exchange Commission is established under section 4
of Title I of the "Securities Exchange Act of 1934."

III

In the year 19—, the petitioner filed its application with said commission
for registration of certain of petitioner's securities on the New York Curb
Exchange. As a part of said application the petitioner made written objec-
tion to the public disclosure of certain information required by the com-
mission, representing such information to constitute trade secrets, the re-
vealing of which the commission has no power to require under said "Securi-
ties Exchange Act of 1934," and representing further that the publication
of such information would unfairly and unreasonably affect the lawful

business of the petitioner, and that the publication thereof was not in the public interest. A copy of said written objections of the petitioner is attached hereto and made a part hereof and marked "Exhibit A."

IV

Thereupon said Securities and Exchange Commission considered the objections of petitioner to such public disclosure of information; and thereafter on ———, 19—, said commission determined that disclosure of the information contained in item 36 of said application is in the public interest and made an order to that effect, a copy of which is attached hereto and made a part hereof and marked "Exhibit B"; the respondent made no determination with respect to the disclosure of the contents of Exhibit F contained in said application.

V

Your petitioner is advised by counsel and, therefore, avers that the compulsory disclosure of such information as to its trade secrets as is thus required by the commission:

(a) Would constitute unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution of the United States, and your petitioner invokes the protection of said amendment;

(b) Would constitute the revealing of trade secrets against which the petitioner is protected by section 24 (a) of said "Securities Exchange Act of 1934";

(c) Would not in fact be in the public interest, but would work unnecessary and unreasonable hardship upon the petitioner.

VI

Your petitioner is further advised by counsel and, therefore, avers that under the Constitution of the United States the Congress is without power or authority to legislate upon the subjects contained in said "Securities Exchange Act of 1934," and your petitioner is further advised and avers that said Securities Exchange Act of 1934 is unconstitutional and invalid, and that all proceedings purporting to be taken under authority of said act are without warrant of law.

VII

Your petitioner is aggrieved by said order issued by said commission and files this petition for the purpose of obtaining a review of such order by this honorable court pursuant to section 25 (a) of Title I of the Securities Exchange Act of 1934. The purpose of this proceeding is to prevent the public disclosure, threatened by said order, of the information referred to in Article III hereof, for the reasons hereinabove set forth. Such purpose would be nullified and defeated if, upon the certifying and filing in this

court by said commission of a transcript of the record upon which the order complained of was entered, as provided by said section 25 (a), such transcript were to become a public record in this proceeding open to public examination, since said transcript will or may contain some or all of the information referred to in Article III hereof (and also the information contained in Exhibit F attached to said application, the disclosure of which the respondent has not determined to be in the public interest), and which petitioner alleges, as aforesaid, should not be so made available. Consequently it is essential, for the protection of the rights of petitioner, that said transcript, when certified by said commission and filed with this court, be not made a public record. And petitioner alleges further that even if said order of the commission should be affirmed by this court, said transcript should not be made a public record in this proceeding, because if made a public record the result thereof would be to disclose to the public not only the information contained in item 36 of said application, the disclosure of which the commission by said order has determined to be in the public interest, but would also result in the public disclosure of the information contained in Exhibit F attached to said application, the disclosure of which the commission by said order has not yet determined to be in the public interest, and which information is therefore not now available to the public and which should not be made so available regardless of the outcome of this proceeding.

Wherefore, petitioner prays that this honorable court will

- (a) Grant leave to petitioner to file this petition, instanter;
- (b) Specifically order these proceedings shall operate as a stay of said commission's order;
- (c) Order that a copy of this petition be forthwith served upon any member of said commission, and that thereupon said commission shall certify and file in this court a transcript of the record upon which the order complained of was entered and that upon such filing said transcript shall be impounded by the clerk of this court and shall not be available for public inspection until further order of this court;
- (d) Reverse, annul, and set aside said order and determination of said commission, insofar as said order determines that disclosure of any of the information aforesaid is in the public interest and directs that any thereof be made available to the public; and
- (e) Grant such further and different relief as to this honorable court may seem fit under the circumstances of the case.

— Manufacturing Company, Inc.,

By _____
President.

Attorney for petitioner,
—, New York City.

979. Order Granting Leave to File Petition for Review in Circuit Court of Appeals.

United States Circuit Court of Appeals
for the _____ Circuit

_____ Manufacturing Company, Inc., Petitioner,	}	No. _____
v.		
Securities and Exchange Commis- sion.		

This cause coming on to be heard on the petition of _____ Manufacturing Company, Inc., it is ordered, adjudged and decreed,

First. That _____ Manufacturing Company, Inc. be and it is hereby granted leave to file its petition, instant; second, that these proceedings shall operate as a stay of the order of the Securities and Exchange Commission, a copy of which, marked "Exhibit B," is attached to said petition; and third, that a copy of said petition be forthwith served upon any member of said Securities and Exchange Commission, and that said Securities and Exchange Commission certify and file in this court a transcript of the record upon which the order of said Securities and Exchange Commission complained of in said petition was entered, and that when the record of proceedings in the matter before the Securities and Exchange Commission shall have been received by the clerk of this court, such record shall be impounded by the clerk of this court and shall not be available for public inspection until further order of this court.

Date _____.

Per Curiam.

Chief Justice.

Let the commission show cause to the within before me _____, at _____ M. at chambers, _____, C. J.

Cross-Reference.

See notes to Form 977.

980. Complaint in Action by the Securities and Exchange Commission to Enjoin Sale of Unregistered Securities.

District Court of the United States
_____ District of _____
Civil Action, File No. _____

Securities and Exchange Commis- sion,	}	Complaint
Plaintiff,		
v.		
_____ and _____,	}	
Defendants.		

1. It appears to the plaintiff that the defendants are engaged and are about to engage in acts and practices which constitute and will constitute

violations of section 5 (a) of the Securities Act of 1933 (U. S. C., Title 15, section 77e (a)), and the plaintiff brings this action to enjoin such acts and practices.

2. This action arises under the Securities Act of 1933, section 22 (a) (U. S. C., Title 15, section 77v (a)).

3. Upon information and belief:

Since on or about ———, 19—, the defendants have been and are now selling securities described by the defendants as “undivided interests of the motor ship or vessel Nassau Clipper,” and in the sale of such securities have been and are now directly and indirectly, using the mails and the means and instruments of transportation and communication in interstate commerce, and have been and are now, directly and indirectly, carrying such securities and causing them to be carried through the mails and in interstate commerce by means and instruments of transportation for the purpose of sale and delivery after sale.

4. No registration statement with respect to such securities is in effect with the Securities and Exchange Commission.

5. Upon information and belief:

The defendants will, unless enjoined, continue to engage in the acts and practices set forth in this count.

Wherefore, the plaintiff demands a preliminary and final judgment enjoining the defendants, their agents, servants, employees, attorneys, and assigns, and each of them, from directly or indirectly;

(a) Making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to sell the securities described by the defendants as “undivided interests of the motor ship or vessel Nassau Clipper” or any other securities through the use or medium of any prospectus or otherwise;

(b) Carrying such securities or causing them to be carried through the mails or in interstate commerce by any means or instruments of transportation for the purpose of sale or delivery after sale.

unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities; providing that the foregoing shall not apply to any security or transaction which is exempt from the provisions of section 5 of the Securities Act of 1933, as amended.

General counsel.

Attorneys for plaintiff.

Address _____

Source of Form.

From record in Securities & Exch. Comm. v. Gilbert (D. C.-Ohio), 29 Fed. Supp. 654, wherein motion to dismiss complaint for insufficiency was overruled.

Cross-Reference.

See notes to Form 975.

Statutory References.

Jurisdiction of courts to punish offenses and restrain violations of law,

rules, or regulations; venue; service of process; appeal; procedure; production of books and papers, 4 F. C. A., Title 15, §§ 77 (v), 78 (aa); U. S. C. A., Title 15, §§ 77 (v), 78 (aa); id. U. S. C.

Transportation in interstate commerce of unregistered securities unlawful, 4 F. C. A., Title 15, § 77 (e); U. S. C. A., Title 15, § 77 (e); id. U. S. C.

981. Answer to Complaint in Action by Securities and Exchange Commission to Enjoin Sale of Unregistered Securities.

District Court of the United States

_____ District of _____

Securities and Exchange Commis-
sion,

Plaintiff,

v.

AB and CD,

Defendants.]

Civil Action

File No. _____

ANSWER

The defendants for answer to the plaintiff's complaint, deny that the defendants are engaged and are about to engage in acts and practices which constitute and will constitute violation of section 5 (a) of the Securities Act of 1933, as amended in 1934, and further deny that this action arises under the Securities Act of 1933, as amended in 1934. They deny each and every allegation of the complaint, except as hereinafter admitted.

These defendants admit that they have sold in the past undivided interests in a certain motor ship known as the "Nassau Clipper," and that said interests are tangible, physical commodities, being interests in a boat, and that such undivided interests in said boat were not and are not securities within the purview and provisions of the Securities Act of 1933, as amended in 1934.

FIRST DEFENSE

Defendants are not now selling and do not propose in the future to sell any further undivided interests in said motor ship, to wit: The Nassau Clipper, and the control of said vessel now rests in the owners of the undivided interests therein.

SECOND DEFENSE

As undivided interests in said boat, the Nassau Clipper, were not securities, it was not necessary for defendants to file a registration statement with the plaintiff.

Wherefore, defendants pray that the complaint be dismissed with costs.

Attorney for defendants.

Address _____

CHAPTER 31

NATIONAL LABOR RELATIONS BOARD

Form

- 990. Charge.
- 991. Complaint.
- 992. Extension of time for answer.
- 993. Answer of respondent.
- 994. Order designating trial examiner.
- 995. Notice of hearing.
- 996. Notice of postponement of hearing.
- 997. Intermediate report of trial examiner.
- 998. Exceptions to intermediate report of the trial examiner.

Form

- 999. Decision and order.
- 1000. Petition for review.
- 1001. Petition for enforcement of an order of National Labor Relations Board.
- 1002. Petition for leave to intervene.
- 1003. Decree granting leave to intervene.
- 1004. Petition for rehearing.
- 1005. Decree of Circuit Court of Appeals.

INTRODUCTION.—The National Labor Relations Board was created by the National Labor Relations Act of July 5, 1935. The principal powers of the board are:

1. By the issuance of cease-and-desist orders, to prevent any person from engaging in any of the following specified unfair labor practices when they affect interstate or foreign commerce: Interference by employers with employees' rights of self-organization and collective bargaining, employer domination of a union, discharge of an employee or discrimination against him because of his union activity or because he has filed charges or has given testimony under the act, and refusal by the employer to bargain collectively with the proper representatives of the employees.

2. To determine whether the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

3. To certify the names of representatives designated by employees, or to ascertain the names by secret ballot.

Hearings are ordinarily conducted before trial examiners in the locality where the unfair labor practices are alleged to have occurred.

The trial examiner's intermediate report on evidence produced at a hearing contains findings of fact, and in cases where the complaint is found justified, contains recommendations as to the steps the employer should take to end the unfair labor practice.

The board reviews cases on appeal from any party to a regional hearing. The findings of the board as to the facts, if supported by evidence, are conclusive. After hearing and decision sustaining a complaint, the board issues a cease-and-desist order requiring the person found to have been

engaged in one of the enumerated unfair labor practices to cease and desist. In case of failure to comply, the board may petition the appropriate Circuit Court of Appeals for enforcement of such order. Review of the board's orders may be obtained by any aggrieved party in a Circuit Court of Appeals.

990. Charge.

United States of America
Before the National Labor Relations Board
Sixth Region
In the matter of
— Carbon Company
and
United Electrical & Radio Workers
of America Local No. —

CHARGE

Pursuant to section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that — Carbon Company, —, —, has engaged in and is engaging in unfair labor practices within the meaning of section 8, subsections (1) and (2) and (5) of said act, in that

(1) The said — Carbon Company has, by threats, newspaper articles, pamphlets, and sundry other methods, interfered, prohibited, and restricted the right of its employees to self-organization, to form, join, and assist the United Electrical & Radio Workers of America Local No. —, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection;

(2) The said — Carbon Company has dominated and interfered with the formation and administration of the — Employees Association and has contributed financial and other support thereto, and continues to dominate and interfere with the administration of said — Employees Association and continues to contribute financial and other support thereto;

(3) The said — Carbon Company, upon being informed that the United Electrical & Radio Workers of America Local No. — represented a majority of the employees of the said — Carbon Company, refused on — —, 19— and at all times thereafter to recognize the said United Electrical & Radio Workers of America Local No. — as the sole bargaining agent of its production employees for the purpose of collective bargaining, as contemplated by the National Labor Relations Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said act.

Name and address of person or labor organization making the charge.
(If made by a labor organization, give also the name and official position of the person acting for the organization.)

Vice-Pres., U. E. & R. W. for Local
No. — U. E. & R. W. of A.
— Street,
—, —.

Subscribed and sworn to before me this — day of —, 19—.

Acting regional director.

Statutory References.

Charges of unfair practices, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Definitions, 9 F. C. A., Title 29, § 152; U. S. C. A., Title 29, § 152; id. U. S. C.

Employee's right to organize, 9 F. C. A., Title 29, § 157; U. S. C. A., Title 29, § 157; id. U. S. C.

Powers of the board, 9 F. C. A., Title 28, § 160; U. S. C. A., Title 29, § 160; id. U. S. C.

Power to make rules and regulations, 9 F. C. A., Title 29, § 156; U. S. C. A., Title 29, § 156; id. U. S. C.

Right to intervene, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Unfair labor practices, 9 F. C. A., Title 29, § 158; U. S. C. A., Title 29, § 158; id. U. S. C.

Rules and Regulations of the National Labor Relations Board.

Certification and signature of documents, papers, or record, Art. 6, §§ 1, 2.

Definitions, Art. 1, §§ 1-6.

Form and requirements of charges, Art. 2, §§ 1-4.

Form and requirements of motions; rulings thereon; made part of record; review of motions; waiver, Art. 2, §§ 14-18.

Intervention, form and requirements of petition; ruling thereon; service thereon, Art. 2, § 19.

Service of papers, Art. 5, §§ 1, 2.

991. Complaint.

(Title.)

It having been charged by United Electrical & Radio Workers of America, Local No. —, that the — Carbon Company, —, —, hereinafter called the "Respondent," has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board, by its Regional Director for the — Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 1, Article IV, section 1, hereby alleges the following:

1. The Respondent is a corporation organized under and existing by virtue of the laws of the commonwealth of —, having its principal office and place of business in the city of —, county of —, and commonwealth of —, and is now and has continuously been engaged at its place of business in the city of —, county of —, commonwealth of —, in the production, sale, and distribution of carbon brushes, electrodes, anodes, and

engaged in one of the enumerated unfair labor practices to cease and desist. In case of failure to comply, the board may petition the appropriate Circuit Court of Appeals for enforcement of such order. Review of the board's orders may be obtained by any aggrieved party in a Circuit Court of Appeals.

990. Charge.

United States of America
Before the National Labor Relations Board
Sixth Region
In the matter of
— Carbon Company
and
United Electrical & Radio Workers
of America Local No. —

CHARGE

Pursuant to section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that — Carbon Company, —, —, has engaged in and is engaging in unfair labor practices within the meaning of section 8, subsections (1) and (2) and (5) of said act, in that

(1) The said — Carbon Company has, by threats, newspaper articles, pamphlets, and sundry other methods, interfered, prohibited, and restricted the right of its employees to self-organization, to form, join, and assist the United Electrical & Radio Workers of America Local No. —, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection;

(2) The said — Carbon Company has dominated and interfered with the formation and administration of the — Employees Association and has contributed financial and other support thereto, and continues to dominate and interfere with the administration of said — Employees Association and continues to contribute financial and other support thereto;

(3) The said — Carbon Company, upon being informed that the United Electrical & Radio Workers of America Local No. — represented a majority of the employees of the said — Carbon Company, refused on — —, 19— and at all times thereafter to recognize the said United Electrical & Radio Workers of America Local No. — as the sole bargaining agent of its production employees for the purpose of collective bargaining, as contemplated by the National Labor Relations Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said act.

Name and address of person or labor organization making the charge.
(If made by a labor organization, give also the name and official position of the person acting for the organization.)

Vice-Pres., U. E. & R. W. for Local
No. — U. E. & R. W. of A.
— Street,
—, —.

Subscribed and sworn to before me this — day of —, 19—.

Acting regional director.

Statutory References.

Charges of unfair practices, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Definitions, 9 F. C. A., Title 29, § 152; U. S. C. A., Title 29, § 152; id. U. S. C.

Employee's right to organize, 9 F. C. A., Title 29, § 157; U. S. C. A., Title 29, § 157; id. U. S. C.

Powers of the board, 9 F. C. A., Title 28, § 160; U. S. C. A., Title 29, § 160; id. U. S. C.

Power to make rules and regulations, 9 F. C. A., Title 29, § 156; U. S. C. A., Title 29, § 156; id. U. S. C.

Right to intervene, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Unfair labor practices, 9 F. C. A., Title 29, § 158; U. S. C. A., Title 29, § 158; id. U. S. C.

Rules and Regulations of the National Labor Relations Board.

Certification and signature of documents, papers, or record, Art. 6, §§ 1, 2. Definitions, Art. 1, §§ 1-6.

Form and requirements of charges, Art. 2, §§ 1-4.

Form and requirements of motions; rulings thereon; made part of record; review of motions; waiver, Art. 2, §§ 14-18.

Intervention, form and requirements of petition; ruling thereon; service thereon, Art. 2, § 19.

Service of papers, Art. 5, §§ 1, 2.

991. Complaint.

(Title.)

It having been charged by United Electrical & Radio Workers of America, Local No. —, that the — Carbon Company, —, —, hereinafter called the "Respondent," has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board, by its Regional Director for the — Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 1, Article IV, section 1, hereby alleges the following:

1. The Respondent is a corporation organized under and existing by virtue of the laws of the commonwealth of —, having its principal office and place of business in the city of —, county of —, and commonwealth of —, and is now and has continuously been engaged at its place of business in the city of —, county of —, commonwealth of —, in the production, sale, and distribution of carbon brushes, electrodes, anodes, and

other carbon products, also volume controls, resistors, and clutch rings, and other like and similar products.

2. The Respondent, in the course and conduct of its business, causes and has continuously caused a preponderant portion of the raw and other materials used in the production of its carbon brushes, electrodes, anodes, and other carbon products, volume controls, resistors, clutch rings, and other like and similar products (the exact amounts and percentages being unknown) to be purchased and transported in interstate commerce from and through states of the United States other than the commonwealth of — to its plant in the commonwealth of —, and causes and has continuously caused a preponderant portion of the carbon brushes, electrodes, anodes, and other carbon products, volume controls, resistors, clutch rings, and other similar products, produced by it (the exact amounts and percentages being unknown) to be sold and transported in interstate commerce from the plant in — in the commonwealth of —, to, into, and through states of the United States other than the commonwealth of —.

3. The United Electrical & Radio Workers of America, Local No. —, hereinafter called the "Union," is a labor organization within the meaning of section 2, subdivision (5) of the National Labor Relations Act.

4. In order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the production departments of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9 (b) of said act.

5. On or before — —, 19—, a majority of the employees in said unit had designated the Union as their representative for the purposes of collective bargaining with the respondent, such designation having been made by the application of the employees for membership in the Union. At all times since — —, 19— the said union has been the representative for collective bargaining of a majority of the employees in said unit and has by virtue of section 9 (a) of said act been the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. On — —, 19— the Respondent while engaged at its plant in —, — was requested, through its officers and agents, to recognize the Union as the exclusive agency for collective bargaining and to bargain collectively with a committee of members of the Union in regard to rates of pay, wages, hours of employment, or other conditions of employment. On — —, 19— and at all times thereafter the Respondent did refuse and has refused to bargain collectively with the Union as aforesaid in that it did refuse and has refused to meet the officers and committee of the Union designated by the Union to bargain collectively and has stated that it recognizes and continues to recognize the "Stackpole Employees Association of St. Marys, Pennsylvania" as the exclusive bargaining agency and that all grievances would be discussed with said Association in spite of the

fact that the formation and administration of said "Stackpole Employees Association of St. Marys, Pennsylvania" is in violation of the National Labor Relations Act as hereinafter set forth.

7. The aforesaid acts of Respondent set forth in paragraph 6 hereof constitute unfair labor practices within the meaning of section 8, subdivision (5) of said act.

8. Respondent, by its officers and agents, while operating as described above, has since —, 19— and on dates thereafter down to and including the date of the filing of this complaint, fostered, encouraged, sponsored, dominated, and interfered with the enlistment of membership and the administration of said Association and has contributed financial and other support thereto.

(a) In that said Respondent has allowed employees of the Respondent to solicit membership in said Association during working hours and on the Respondent's property, the same privilege being denied the Union.

(b) In that said employees have been compensated by the Respondent while they were engaged in such solicitation.

(c) In that office space is furnished by the Respondent to the Association while such assistance is refused to the Union.

(d) In that Respondent coerced and intimidated and is coercing and intimidating its employees to join or assist the Association and threatened and intimidated employees if they joined or assisted the Union.

(e) In that Respondent permits representatives elected under the constitution and by-laws of said Association to promote, manage, and attend to the business of the Association on Respondent's time and pay at its expense and with the permission of the Respondent.

(f) In that Respondent, through its officers, directors, agents, foremen, superintendents, and supervisors and through pamphlets and other publications printed and distributed at the expense of the Respondent, and through newspapers owned and/or controlled by the Respondent, encourages and commends the administration and operation of and membership in the Association.

(g) In that those engaged in the administration of the Association are afforded the facilities of Respondent's bulletin board for the publication of activities and propaganda although the same privilege is denied by employees who desire any other form of employee representation and is denied to the Union.

(h) In that said respondent has, in the conduct of said Association and in various and sundry other ways well known to the Respondent, dominated and interfered with and does dominate and interfere with the administration of said Association.

(i) In that said Respondent has, in the conduct of said Association and in various and sundry other ways well known to the Respondent, contributed and does contribute financial and other support to the Association.

9. The aforesaid acts of the Respondent enumerated in paragraph 8 above constitute unfair labor practices within the meaning of section 8, subdivision (2) of said act.

10. The "Stackpole Employees Association of St. Marys, Pennsylvania" is a labor organization within the meaning of section 2, subdivision (5) of said act.

11. The aforesaid acts of the Respondent enumerated in paragraphs 6, 7, 8, and 9 above, constitute unfair labor practices affecting commerce within the meaning of section 8, subdivisions (1), (2) and (5) and section 2, subdivisions (6) and (7) of said act.

Wherefore, the National Labor Relations Board on this — day of —, 19—, issues its complaint against the — Carbon Company, Respondent herein.

Cross-Reference.

In connection with Forms 991 to 996, see notes to Form 990.

Complaint, service of notice thereon, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Statutory References.

Amendment of complaint, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Rules and Regulations of the National Labor Relations Board.

Amendment of complaint, Art. 2, § 7.

NOTES TO DECISIONS

In General.

Common-law formality of pleading is not required, but there must be substantial elements of due process. National Labor Relations Bd. v. Biles Coleman Lbr. Co. (C. C. A. 9), 98 Fed. (2d) 16.

Complaint by board charging employer with unfair labor practices was properly

based upon an alleged interference by employer with the conduct of an election which the board had scheduled to determine as to representative of the employees. National Labor Relations Bd. v. Oregon Worsted Co. (C. C. A. 9), 96 Fed. (2d) 193.

992. Extension of Time for Answer.

(Title.)

The National Labor Relations Board having, on the — day of —, 19—, issued its complaint against the — Carbon Company, —, — (hereinafter called the "Respondent"), and

The Respondent having, pursuant to Article II, section 10, of the Rules and Regulations of the National Labor Relations Board, Series 1, as amended, the right within five days from the service of said complaint to file an answer thereto and

Proper cause having this day been shown by counsel for the Respondent why the time in which its answer may be filed should be extended;

I, —, Regional Director of the National Labor Relations Board for the — Region, pursuant to authority vested in me by Article II, section 12, of the said Rules and Regulations as amended, do hereby extend until

—, 19— the time in which the said answer may be filed by this Respondent.

Regional director.

**Rules and Regulations of the National
Labor Relations Board.**

Extension of time to answer, Art. 2,
§ 12.

993. Answer of Respondent.

(Title.)

Now comes the respondent, — Carbon Company, by its attorneys and, for its answer to the complaint of the National Labor Relations Board, reserving and saving its objections to the jurisdiction of said board and to the sufficiency in law of said complaint, respectfully shows and alleges:

1. Respondent admits the allegations of paragraph 1 of the complaint.
2. For its answer to the allegations of paragraph 2 of the complaint, the respondent admits that it purchases a substantial portion of its raw materials from suppliers located in states other than the commonwealth of — and that such portion of such materials is transported from, and in some cases through, other states to the respondent's plant in the commonwealth of — by rail or other carriers, which are not owned or controlled, directly, or indirectly, by the respondent; respondent also admits that it sells a substantial portion of the carbon brushes, electrodes, anodes, and other carbon products, volume controls, resistors, clutch rings, and other similar products produced by it, to customers who are situated in states other than the commonwealth of —, and that such products are transported to and, in some cases, through other states by such independent rail or other carriers. Respondent denies each and every other allegation of said paragraph 2 and denies that it is engaged in, or that its production activities are a part of, interstate commerce, either by reason of the facts hereinbefore admitted, or otherwise.

3. For its answer to the allegations of paragraph 3 of the complaint, respondent avers that it has no knowledge as to the truth or correctness of such allegations, and, if the same be deemed material, demands proof thereof.

4. For its answer to the allegations of paragraph 4, of the complaint, respondent is advised by counsel, believes and therefore avers, that such allegations constitute conclusions of law which require no answer, and, insofar as such allegations may be construed as containing any averments of fact, the respondent avers that it has no knowledge as to the truth or correctness thereof, and, if the same be deemed material, demands proof thereof.

5. For its answer to the allegations of paragraph 5 of the complaint, the respondent denies each and every allegation of fact therein set forth.

Respondent specifically denies that, on or before — —, 19—, or at any other time, a majority of employees in the unit therein described had or have designated the Union as their representative for the purpose of collective bargaining with the respondent, or for any other purpose. Respondent has no knowledge as to the number of applications for membership which said Union may have obtained, but denies that such applications or any of them constituted a designation of the Union as the representative of a majority, or of any, of the employees of the respondent for purposes of collective bargaining, or otherwise. The respondent also denies that such Union has been at any time, or now is, the representative for collective bargaining of the majority of the employees in said unit, and also denies that said Union has been or is the exclusive representative of all the employees in such unit, for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment, or other conditions of employment, or for any other purposes.

6. For its answer to the allegations of paragraph 6 of the complaint, the respondent denies them as they are therein stated. The respondent admits that, on or about — —, 19—, it was requested to recognize the Union as the exclusive agency for collective bargaining of all of its employees and that it was directed by officers of said Union to enter into a written agreement with the Union to such effect; but the respondent denies that said Union was or is the exclusive agency of the respondent's employees for the purposes of collective bargaining, or for any other purposes, and, on the contrary, the respondent avers, upon the basis of information, which it believes to be correct, that an organization or union known as "Stackpole Employees Association of St. Marys, Pennsylvania" was, on — —, 19—, and has been at all times since said date, the duly appointed representative of more than a majority of the respondent's employees for purposes of collective bargaining. Respondent also denies that, on or about — —, 19—, it refused to bargain collectively with the Union as aforesaid, and denies that it did refuse or has refused to meet the officers or committee of said Union. Respondent admits that it has recognized and continues to recognize the said "Stackpole Employees Association of St. Marys, Pennsylvania" as the exclusive bargaining agent of respondent's employees, and that it has made statements that all grievances should be discussed with said Association, and avers that it has done so because said Association is, in fact and in law, the exclusive representative of all respondent's employees for purposes of collective bargaining. Respondent denies that the formation or administration of said "Stackpole Employees Association of St. Marys, Pennsylvania" is in violation of the National Labor Relations Act, or of any other applicable law or statute, and denies each and every other allegation of said paragraph 6 not hereinbefore specifically admitted.

Further answering the allegations set forth in said paragraph 6 of the complaint, the respondent avers that, on several occasions, it requested the Union therein named to produce satisfactory proof as to the number of

employees, if any, which had designated said Union as their representative for purposes of collective bargaining, and that said Union, through its officers and agents, has refused and neglected to furnish any such proof and is unable to do so. Respondent also avers that it thereafter requested the "Stackpole Employees Association of St. Marys, Pennsylvania" to produce satisfactory proof as to the number of employees who had selected said Association as their representative for the purposes of collective bargaining, that said Association immediately complied with such request, and that said Association has been and is the agency or representative designated by more than a majority of respondent's employees for purposes of collective bargaining.

7. For its answer to the allegations of paragraph 7 of the complaint, respondent is advised by counsel, believes and therefore avers that such allegations constitute conclusions of law which, therefore, require no answer, but insofar as such allegations may be construed as containing averments of fact, the respondent denies the same.

8. For its answer to the allegations of paragraph 8 of the complaint, respondent denies each and every allegation of fact set forth therein.

With respect to the first sentence of said paragraph, the respondent specifically denies that it, by its officers or agents, or otherwise, did, during the month of —, 19—, or at any other time, cause to be put in force and effect at its plant in —, —, any plan of employee representation for the purposes of collective bargaining, through an Association formulated or worked out by the director, officers, or agents of the respondent, or under its supervision, or otherwise. Respondent also denies that the association therein named was formulated, designed, or worked out by the respondent or by any of its directors, officers, or agents, or under the respondent's supervision.

With respect to the second sentence of said paragraph 8, the respondent denies that said Association was designed or intended by the respondent to defeat, impair, or prevent the self-organization of the employees of the respondent, and on the contrary avers, that the respondent does not, either directly or indirectly, direct or control the objects or purposes of said Association.

With respect to the third sentence of said paragraph 8, the respondent denies that it caused said Association to become operative, and denies that it has, at any time, openly, publicly, or notoriously expressed its antagonism or opposition to the formation and/or recognition of any other form of employee organization.

With respect to the fourth sentence of said paragraph 8, respondent denies that it brought said Association into existence, denies that it did not afford all or any of its employees the opportunity or right to select any other or different form or character of organization; and denies that it has at any time dominated the formation of said Association, by any of the means set forth in said sentence, or otherwise. Respondent also

denies that it has opposed any other forms of employee organization, and denies that it has supported the adoption of the Association therein named.

Further answering the allegations of said paragraph 8, respondent avers that its employees have, of their own free will, caused the formation of the organization therein described as the "Stackpole Employees Association of St. Marys, Pennsylvania," and have been and now are freely operating and administering the same, for purposes of collective bargaining, without interference, influence, restraint, or coercion on the part of the respondent, or its agents. Respondent also avers, as hereinbefore set forth, that more than a majority of its employees have voluntarily joined said Association and have freely chosen and designated it as their representative for purposes of collective bargaining with the respondent, and that by reason thereof, said Association has been, at all of the times mentioned in said complaint and now is, the exclusive representative of all of the respondent's employees, for such purposes.

9. For its answer to the allegations of paragraph 9 of the complaint, respondent denies each and every one of said allegations as hereinafter set forth:

With respect to the opening sentence of said paragraph 9, the respondent denies that it has, since —, 19—, or at any other time, fostered, encouraged, sponsored, dominated, or interfered with the enlistment of membership in, or the administration of said Association, or that it has contributed financial or other support thereto, in any of the ways set forth in the subparagraphs of said paragraph 9, or otherwise.

(a) With respect to the allegations of subparagraph (a) of said paragraph 9, respondent denies the same, except that it admits that, on one occasion, by an informal arrangement with the representatives of said Association and the representatives of said Union, the respondent permitted certain representatives of the said Association and certain representatives of said Union to solicit membership in said Association or said Union, as the case might be, on plant property, for a limited period of time; and the respondent avers that, except during such limited period, it has not permitted, and does not permit, any of its employees to solicit membership in either said Association or said Union.

(b) With respect to the allegations of subparagraph (b) of said paragraph 9, respondent denies the same.

(c) With respect to the allegations of subparagraph (c) of said paragraph 9, respondent denies that office space is furnished to the Association while such assistance is refused the Union, but admits that it has never objected to the occasional use of unoccupied portions of its plant by its employees, if such use does not interfere with respondent's operations or business.

(d) With respect to the allegations of subparagraph (d) of said paragraph 9, respondent denies the same.

(e) With respect to the allegations of subparagraph (e) of said paragraph 9, respondent denies the same; except that respondent admits that,

from time to time, officers or representatives of the Association and officers or representatives of the Union have conferred with representatives of the respondent on matters of mutual interest, during working hours, without loss of pay.

(f) With respect to the allegations of subparagraph (f) of said paragraph 9, the respondent denies the same, except that it admits that it has on occasion commended its employees for the spirit of cooperation displayed by them in their dealings with the respondent.

(g) With respect to the allegations of subparagraph (g) of said paragraph 9, respondent denies the same, except that it admits that it has posted copies of a certain agreement between it and the Association. Respondent has not permitted and does not allow the Association or any other group of employees to use its bulletin boards, except for the publication of official communications of interest to all of respondent's employees, which privilege is available to all of the respondent's employees.

(h) With respect to the allegations of subparagraph (h) of said paragraph 9, respondent denies the same.

(i) With respect to the allegations of subparagraph (i) of said paragraph 9, respondent denies the same.

10. For its answer to the allegations of paragraph 10 of the complaint, respondent is advised by counsel, believes and therefore avers that the same constitute conclusions of law and therefore require no answer; but insofar as the allegations may be construed as containing averments of fact, the respondent denies the same.

11. Respondent admits the allegations of paragraph 11 of the complaint.

12. For its answer to the allegations of paragraph 12 of the complaint, the respondent denies the same as they are therein stated.

With respect to the allegations of the first and second sentences of said paragraph, respondent avers that it has no knowledge of the truth or correctness thereof, and, if the same be deemed material, demands proof thereof.

With respect to the allegations of the third sentence of said paragraph 12, respondent denies that any or all of its employees have been or are on strike and with respect to the remaining averments of said sentence, respondent avers that it has no knowledge as to the truth or correctness thereof, and, if the same be deemed material, demands proof thereof.

With respect to the fourth sentence of paragraph 12, respondent avers that it has no knowledge as to the truth or correctness thereof, and, if the same be deemed material, demands proof thereof.

With respect to the fifth sentence of paragraph 12, the respondent denies that any or all of its employees struck because of any unfair labor practices on the part of the respondent, denies that it has been guilty of any unfair practices, denies that any of its employees are still not reinstated, and denies that any of the persons therein referred to are entitled to reinstatement, and on the contrary avers that such persons voluntarily left the employment of the respondent and are no longer its employees.

With respect to the allegations of the sixth sentence of said paragraph 12, respondent denies that it has, at any time, through its officers or agents, or otherwise, solicited individual employees who were members of the Union, to return to employment, denies that it has threatened such employees, or any other employees with permanent discharge if they did not so return to employment, denies that it has refused to bargain collectively with the Union, and denies that it has been or is dominating or interfering with the administration of or contributing financial or other support to the Association. Respondent admits that it has requested a few persons who did not report for work on or after — —, 19—, to advise the respondent as to whether or not such persons had left the respondent's employment, or were not reporting to work because of fear of violence or personal injury.

Further answering the allegations of said paragraph 12, respondent avers that, on or about — —, 19—, approximately — out of — employees of the respondent voluntarily left the employment of the respondent, and that such employees have from time to time attempted to prevent other employees of the respondent from working, by the use of violence, intimidation, and other unlawful acts, in complete disregard of the rights of such other employees and of the respondent. Respondent also avers that such persons who have voluntarily left the employment of respondent, as aforesaid, are no longer employees of the respondent and are, therefore, not entitled to reinstatement, or to any other relief.

13. For its answer to the allegations of paragraph 13 of the complaint, respondent is advised by counsel, believes and, therefore, avers that the same constitute conclusions of law, which therefore require no answer; but insofar as such allegations may be construed as containing averments of fact, respondent denies the same.

14. For its answer to the allegations of paragraph 14 of the complaint, respondent is advised by counsel, believes, and, therefore, avers that the same constitute conclusions of law, which therefore require no answer; but, insofar as such allegations may be construed as containing averments of fact, respondent denies the same.

15. For its answer to the allegations of paragraph 15 of the complaint, respondent is advised by counsel, believes and, therefore, avers that the same constitute conclusions of law, which therefore require no answer, but, insofar as such allegations may be construed as containing averments of fact, respondent denies the same.

16. Further answering the complaint of the National Labor Relations Board, the respondent is advised by counsel, believes and, therefore, avers that the same is insufficient in law, for the following reasons, among others:

(a) The respondent is not engaged in interstate commerce and its relations and transactions with its employees are not in or affecting interstate commerce, and are, therefore, not subject to the jurisdiction of the National Labor Relations Board.

(b) The National Labor Relations Board has no jurisdiction over the respondent or its relations with its employees and has no jurisdiction or authority to hear or determine any of the matters set forth in the complaint.

(c) The National Labor Relations Board has no jurisdiction over the subject-matter of the complaint for the reason that the persons described in said complaint, as members of the Union therein named, are not employees of the respondent and are not entitled to any of the relief therein requested.

(d) The complaint does not set forth facts constituting any unfair labor practices on the part of the respondent and is insufficient in law.

Wherefore, the respondent prays that the complaint be dismissed.

Attorney for respondent.

Statutory Reference.

Answer and right to appear and defend, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

Rules and Regulations of the National Labor Relations Board.

Amendment of answer, Art. 2, § 13.

Form and requirements of answer, Art. 2, §§ 10, 11.

994. Order Designating Trial Examiner.

(Title.)

A charge having been filed in this matter, and it having appeared to the Regional Director of the ——— Region that a proceeding in respect thereto should be instituted, and the board having considered the matter and being advised in the premises,

It is hereby ordered, that ——— act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations, Series 1, as amended, of the National Labor Relations Board.

Dated, ———, ———, ———, 19——.

By direction of the board:

Secretary.

Rules and Regulations of the National Labor Relations Board.

Designation of trial examiner, Art. 23, § 23.

995. Notice of Hearing.

(Title.)

Please take notice that on the ——— day of ———, 19——, at ——— —. M., in the ——— Hall, ——— Street, ———, ———, a hearing will be conducted before the National Labor Relations Board by a Trial Examiner to be designated by it in accordance with said Rules and Regulations, Series 1, as amended,

Article IV, and Article II, section 22, on the allegations set forth in the complaint attached hereto, at which time and place you will have the right to appear, in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Regional Director for the — Region, with offices at — Building, —, —, acting in this matter as the agent of the National Labor Relations Board, an answer to the attached complaint on or before the — day of —, 19—.

Enclosed herewith for your information is a copy of the charge, also a copy of Rules and Regulations, Series 1, as amended, made and published by the National Labor Relations Board pursuant to authority granted in the National Labor Relations Act. Your attention is particularly directed to Article II of said Rules and Regulations.

In witness whereof the National Labor Relations Board has caused this, its complaint and notice of hearing to be signed by the Regional Director for the — Region on the — day of —, 19—.

Regional director.

Rules and Regulations of the National
Labor Relations Board.

Extension of date of hearing, Art. 2,
§ 6.

996. Notice of Postponement of Hearing.

(Title.)

Please take notice that the hearing in the above-entitled matter previously scheduled for the — day of —, 19—, at — —. M., in the — Hall, —, —, is postponed until —, — —, 19—.

In witness whereof, the National Labor Relations Board has caused this, its notice of postponement of hearing, to be signed by the Regional Director for the — Region on the — day of —, 19—.

Regional Director for the — Region.

997. Intermediate Report of Trial Examiner.

(Caption.)

Upon charge duly made, and acting pursuant to authority granted in section 10 (b) of the National Labor Relations Act, approved July 5, 1935, —, agent of the National Labor Relations Board, designated by National Labor Relations Board Rules and Regulations, Series 1, as amended, Article IV, section 1, issued its complaint dated — —, 19—,

against the — Carbon Company, the respondent herein. The complaint and notice of hearing thereon were duly served upon respondent on —, 19—, in accordance with said Rules and Regulations, Series 1, Article V, section 1. The complaint was amended by motions at the hearing. The complaint, as amended, alleged as follows: * * *

Thereafter respondent filed its answer, which was amended by motion at the hearing near the close of the respondent's case and as amended reserved objection to the jurisdiction of the board and sufficiency in law of the complaint, * * *

No motions were made before the hearing.

Pursuant to the notice of hearing, the undersigned, as agent of the National Labor Relations Board designated by said Rules and Regulations, Series 1, as amended, Article IV, section 2, and Article II, section 22, to conduct hearings in this case, conducted a hearing on July —, —, —, —, and —, inclusive, 19—, at — Hall, — Street, —, —.

* * *

Full opportunity to be heard, to cross-examine witnesses, and to produce evidence bearing upon the issues, was afforded to the parties.

Certain oral motions were made and disposed of, at the hearing, as follows: * * *

The parties were offered full opportunity for argument at the close of the hearing, which was declined. The right to file briefs was granted but none were filed.

Upon the record thus made, the stenographic report of the hearing, and all the evidence, including oral testimony, documentary and other evidence received at the hearing, the undersigned makes, in addition to the above, the following specific findings of fact: * * *

CONCLUSIONS AND RECOMMENDATIONS

Upon the basis of the foregoing findings of fact, the undersigned hereby determines and concludes: * * *

Wherefore, the undersigned recommends that:

1. Respondent cease and desist from interfering with, restraining, and coercing its employees, in the exercise of the right of self-organization of their own form, or assist a labor organization of their own choosing, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for purposes of collective bargaining or other mutual aid or protection.

* * *

5. In order to effectuate the policy of the act, take the following affirmative action:

(a) Offer immediate and full reinstatement to [Here insert].

* * *

(e) File with the Regional Director for the — Region, on or before the — day after receipt of a copy of this report, a report in writing setting forth in detail, the manner and form in which it has complied with the foregoing requirements. It is further recommended that unless on or before the — day, following the receipt of a copy of this report, respondent notify said Regional Director in writing that it will comply with the foregoing recommendation, the matter to be referred to the National Labor Relations Board and that said board issue an order requiring the respondent to take the action aforesaid.

Dated at —, —, this — day of —, 19—.

Trial examiner.

Cross-Reference.

In connection with Forms 997, 998, see notes to Forms 990, 999.

Modification of finding or order, 9 F. C. A., Title 29, § 160 (d) (e); U. S. C. A., Title 29, § 160 (d) (e); id. U. S. C.

Statutory References.

Finding of facts, 9 F. C. A., Title 29, §§ 159 (c) (d), 160 (e); U. S. C. A., Title 29, §§ 159 (c) (d), 160 (e); id. U. S. C.

Rules and Regulations of the National Labor Relations Board.

Report of trial examiner, Art. 2, § 32.

998. Exceptions to Intermediate Report of the Trial Examiner.

Now comes the respondent, — Carbon Company, by its attorneys, and saving and reserving unto itself the right to file such further objections and exceptions as it may see fit, objects and excepts to the Intermediate Report of the Trial Examiner, filed herein on — —, 19—, to the findings, conclusions, and recommendations therein set forth, and to the rulings of said Trial Examiner upon certain objections and motions made by the respondent during the hearing, as follows:

TO THE INTERMEDIATE REPORT

1. The respondent objects and excepts to the intermediate report in its entirety, for the following reasons, among others:

(a) The intermediate report is contrary to the evidence adduced at the hearing.

(b) The intermediate report is contrary to the law.

(c) The National Labor Relations Board and its said Trial Examiner have no jurisdiction over the subject-matter of the intermediate report and said Trial Examiner had no jurisdiction to make and file said intermediate report.

(d) The National Labor Relations Board and its said Trial Examiner have no jurisdiction over the respondent.

(e) The National Labor Relations Act does not and can not lawfully apply to the respondent or to the respondent's relations with its employees.

* * *

2. The respondent objects and excepts to the preliminary statement in said intermediate report that "full opportunity to be heard, to cross-examine witnesses, and to produce evidence bearing upon the issues, was afforded to the parties."

TO THE FINDINGS OF FACT

3. The respondent excepts to that part of Finding 2 which finds that the respondent has a subsidiary plant at Ridgway.

* * *

92. The respondent excepts to Finding No. 96 in its entirety.

TO THE CONCLUSIONS ON COMMERCE

93. With respect to the findings or conclusions in the intermediate report, under the heading "Commerce," the respondent excepts to the following portions thereof:

* * *

TO THE CONCLUSIONS AND RECOMMENDATIONS

95. The respondent objects and excepts, generally and specifically, to each and every conclusion or determination set forth in said intermediate report, which conclusions or determinations appear on pages 33 and 34 of said intermediate report and are numbered 1, 2, 3 and 4.

* * *

TO THE TRIAL EXAMINER'S RULING ON MOTIONS AND OBJECTIONS MADE BY THE
RESPONDENT DURING THE COURSE OF THE HEARING

97. The respondent excepts to the ruling of the Trial Examiner upon an objection of the respondent to testimony of —, a witness for the complainant, as follows (R. 12 to 14): * * *

150. The respondent reserves the right to file such additional objections and exceptions as a further examination of the record may indicate to be appropriate.

Respectfully submitted,

_____ Carbon Company

By _____

Its attorneys.

Rules and Regulations of the National
Labor Relations Board.

Exceptions to report; time for filing;
waiver, Art. 2, §§ 34, 35.

999. Decision and Order.

United States of America
Before the
National Labor Relations Board
In the Matter of — Carbon Company and
United Electrical and Radio Workers of America,
Local No. —
Case No. — Decided — —, 19—

STATEMENT OF THE CASE

Upon charges duly filed by United Electrical and Radio Workers of America, Local No. —, —, —, herein called Local No. —, the National Labor Relations Board, herein called the "Board," by —, Regional Director for the — Region (—, —) issued its complaint dated — —, 19—, against — Carbon Company, —, —, herein called the "Respondent," alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of section 8 (1), (2) and (5) and section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the "Act."

* * *

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

* * *

Upon the basis of the foregoing findings of fact and upon the entire record in the proceeding the Board makes the following:

CONCLUSIONS OF LAW

* * *

ORDER

Upon the basis of the findings of fact and conclusions of law and pursuant to section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, — Carbon Company, —, —, and its officers, agents, successors, and assigns, shall:

1. Cease and desist:

(a) From in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in section 7 of the Act.

* * *

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw all recognition from — Employees' Association of —, —, as a representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and completely disestablish said association as such representative.

* * *

(g) Notify the Regional Director for the — Region in writing within — days from the date of this order what steps the respondent has taken to comply herewith.

And it is further ordered that the allegation in the complaint that the respondent has engaged in an unfair labor practice within the meaning of section 8 (3) of the Act, by discharging its employees who struck on —, 19—, be, and it hereby is, dismissed.

* * *

Cross-Reference.

See notes to Forms 990, 1000, 1001.

Rules and Regulations of the National Labor Relations Board.

Contents of record, Art. 2, § 33.

Procedure before board after submission of examiner's report, Art. 2, § 36.

Statutory References.

Finding of facts and order thereon, 9 F. C. A., Title 29, §§ 159 (e) (d), 160 (c); U. S. C. A., Title 29, §§ 159 (c) (d), 160 (c); id. U. S. C.

Modification of finding or order, 9 F. C. A., Title 29, § 160 (d) (e); U. S. C. A., Title 29, § 160 (d) (e); id. U. S. C.

NOTES TO DECISIONS

In General.

Notwithstanding the mandatory form of 9 F. C. A., Title 29, § 160 (c); U. S. C. A., Title 29, § 160 (c); id. U. S. C., its provisions in substance leave to the board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case requires an affirmative order and the particular affirmative relief to be ordered. *National Labor Relations Bd. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 82 L. ed. 831, 58 Sup. Ct. 571, 115 A. L. R. 307, revg. (C. C. A. 3), 91 Fed. (2d) 178.

Facts found by the board held sufficient foundation for its order directing the employer to cease unfair labor practices, to withdraw all recognition of union which it had dominated and contributed to. *National Labor Relations Bd. v. Pacific Greyhound Lines*, 303 U. S. 272, 82 L. ed. 838, 58 Sup. Ct. 577, revg. (C. C. A. 9), 91 Fed. (2d) 458.

Where complaint did not refer to any discrimination in hiring any men or charge any violation in connection there-

with, finding of the board that in making stipulations in its offer to hire new employer violated 9 F. C. A., Title 29, § 158 (3); U. S. C. A., Title 29, § 158 (3); id. U. S. C., was irrelevant. *National Labor Relations Bd. v. Sands Mfg. Co.*, 306 U. S. 332, 83 L. ed. 682, 59 Sup. Ct. 508, affg. (C. C. A. 6), 96 Fed. (2d) 721.

It is not necessary, in the board's order for reinstatement with back pay, that the order include the names of employees and the amounts they should receive, particularly as the compensation is to be determined as of the time of reinstatement. *National Labor Relations Bd. v. Carlisle Lbr. Co.* (C. C. A. 9), 99 Fed. (2d) 533. Cert. den. 306 U. S. 646, 83 L. ed. 1045, 59 Sup. Ct. 586.

The act contemplates but one order of the board, and not supplementary orders. *National Labor Relations Bd. v. Carlisle Lbr. Co.* (C. C. A. 9), 99 Fed. (2d) 533. Cert. den. 306 U. S. 646, 83 L. ed. 1045, 59 Sup. Ct. 586.

Order of board ordering dissolution of company-dominated union should also contain statement that the employees are

free "to join or not to join any labor organization or to form or not to form hereafter a local organization of their own." Cudahy Packing Co. v. National

Labor Relations Bd. (C. C. A. 8), 102 Fed. (2d) 745; Hamilton-Brown Shoe Co. v. National Labor Relations Bd. (C. C. A. 8), 104 Fed. (2d) 49.

1000. Petition for Review.

(Caption.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the ——— Circuit:

——— Metallurgical Corporation, a ——— corporation, respectfully petitions this honorable court for a review of a certain order entered on ———, 19——, by the National Labor Relations Board (hereinafter referred to as the "Board") in a proceeding instituted by it against this petitioner, appearing and designated upon the records of the Board as "In the Matter of Fansteel Metallurgical Corporation and Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, Case No. C-235."

In support of this petition, your petitioner respectfully shows:

JURISDICTION

1. (a) Your petitioner is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the state of ——— and qualified to do business as a foreign corporation under the laws of the state of ———. Petitioner maintains, and at all times herein mentioned has maintained, its only plant and principal place of business and transacts and at all times herein mentioned has transacted its principal business in the city of ———, county of ———, state of ———, within this circuit.

(b) In the complaint issued and order entered by the Board in the aforementioned proceeding, it was alleged that your petitioner engaged in unfair labor practices in the city of ———, county of ———, state of ———, within this circuit.

(c) By reason of the matters alleged in subdivisions (a) and (b) of this paragraph 1, this court has jurisdiction of this petition by virtue of section 10 (f) of the National Labor Relations Act.

UNDISPUTED FACTS

2. The charges upon which the Board's complaint in the above proceeding was issued grew out of the so-called "Sit-down Strike" during which two key buildings of the petitioner's plant were seized by ——— employees and forcibly retained from ———, 19—— to ———, 19——. The occupancy of these two buildings effectively closed the entire plant. The Board found in its decision that ——— hours following the seizure, the petitioner's officers made a specific demand upon the men holding the plant for the return of possession, which was rejected by the men, and thereupon the petitioner's representatives announced that all of the men occupying the buildings were discharged for their seizure and retention.

(a) The Board and the petitioner stipulated before the Trial Examiner to the following facts: With — or — exceptions, the petitioner did not, at the time of the discharge, know the identity, number, or union affiliations, if any, of the men in occupancy of the buildings. The day following the seizure, the Circuit Court of — County, after hearing counsel for the petitioner and Lodge —, issued an injunctive order finding that the seizure of the buildings was illegal and that the men in occupancy thereof had been discharged for seizing and retaining the buildings, and directing that the men vacate the premises and return the possession to the petitioner. Upon the refusal of the men to comply with the order, a writ of attachment was issued for their arrest. The sheriff made two attempts to evict the men and encountered resistance with violence on both occasions. The first attempt was unsuccessful. The men were violently evicted by the sheriff on his second effort. On both occasions, the discharged employees laid down a barrage of quart bottles of sulphuric acid, huge quantities of heavy steel and iron missiles, including pipes, bolts, and tools directly at the sheriff and his deputies. A number of the deputies were injured by the missiles and acid.

(b) The undisputed evidence showed that the unlawful occupancy of the buildings occasioned loss to the petitioner approximating — dollars (\$—), consisting of physical damage to the buildings, equipment, and inventory, and the loss of fixed charges and business during the period the men held possession of the building. Apart from the damage to the buildings occasioned by their conversion into living quarters, and the rust and other injury to the machinery resulting from neglect, the deliberate physical destruction by the men in the occupancy of the buildings consisted of breaking of windows and frames and the destruction of tools, parts, sulphuric acid, and other inventory and equipment.

(c) The undisputed evidence showed the following: After the damage to the buildings and equipment had been repaired, the petitioner reopened its plant. Such of the men discharged for the plant seizure who filed applications for re-employment were rehired by the petitioner without condition or limitation and without reference to their previous or future union activities, excepting only three who were not re-employed for reasons unconnected with any of the charges in the Board proceeding. The remaining discharged employees did not apply for re-employment and, together with certain other employees in sympathy with them, engaged in what they termed a "strike." Upon the reopening of the plant, — members of Lodge —, some of whom were officers and members of the bargaining committee and others of whom were outstandingly active in union affairs, resumed work at the plant.

(d) Lodge — and all persons named in the complaint issued by the Board, who participated in the sit-down strike, were parties to the injunction proceeding in the Circuit Court of — County, —. After a full hearing, — sit-down strikers were found guilty of contempt of court for refusing to vacate the petitioner's plant and for resisting, with force, the

law enforcing officers, and all were fined and sentenced to jail for varying terms from — days to — months. Thereafter, the Circuit Court of — County entered a final decree, without objection by counsel for the sit-down strikers and Lodge —, finding that the seizure and withholding of the plant was unlawful, and the men occupying the plant, having refused to vacate the premises, had been properly discharged "for such unlawful and violent seizure." No appeal was taken from this final decree, and it now remains in full force and effect.

PLEADINGS

3. Upon a charge filed by an organizer for the Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge — (herein called "Lodge —"), the Board issued a complaint against the petitioner on —, 19—, charging, in substance:

(a) That although, on — and thereafter, Lodge — was the exclusive bargaining representative of petitioner's employees, petitioner did, on —, 19—, —, 19—, and thereafter, fail and refuse to bargain collectively with Lodge — on behalf of its employees;

(b) That by various acts alleged in the complaint petitioner coerced and interfered with the employees' right to self-organization for collective bargaining purposes;

(c) That while engaged in operations at the North Chicago plant, the petitioner did, on —, 19—, discharge certain employees named in the complaint and did subsequently discharge two other employees, by reason of their union membership and concerted activities for the purpose of collective bargaining;

(d) That on —, 19—, petitioner refused to reinstate to their regular positions of employment, all of the persons named as having been discharged on — and certain others, by reason of their union membership and their concerted activities for the purpose of collective bargaining; and,

(e) That petitioner caused to be organized a labor organization of its employees known as "Rare Metal Workers of America, Local No. 1," solicited members therefor, threatened employees with loss of employment for failure to join, and contributed financial and other support to the organization in violation of the National Labor Relations Act.

4. The petitioner filed an answer which was in part amended during the hearing to conform to the proof. The answer, as amended, denied in substance the allegations of the complaint in their entirety, and further set out:

(a) That petitioner did not, on —, 19— or at any other time, discharge any of the persons named in the complaint by reason of membership in a union or by reason of concerted activities for collective bargaining; that such of the persons named in the complaint as engaged in the seizure and occupancy of petitioner's buildings on —, 19—, were

on that date, upon their refusal to vacate the premises, discharged for the seizure and retention of the plant and for no other reason;

(b) That no other employees were thereafter discharged excepting a foreman who had not been a member of the union and who was discharged for insubordination and inefficiency in addition to the fact that a reorganization was contemplated reducing his department and making the post of foreman unnecessary;

(c) That of the persons petitioner was charged with improperly refusing to reinstate, most had either participated in the plant seizure and been discharged therefor or had aided and abetted in the illegal and violent retention of the plant, and accordingly the petitioner was under no duty or obligation to offer reinstatement to such persons; that certain persons had been affirmatively offered reinstatement, which they had declined; and that petitioner was not obligated to reinstate certain persons by reason of their inefficiency to perform the required duties;

(d) That in addition to the foregoing matters, certain of the departments of the petitioner's plant had been reorganized for efficiency purposes and as a result certain positions had been abolished, including positions formerly occupied by certain of the persons named in the complaint; that, accordingly, petitioner was not obligated to reinstate such persons;

(e) That Lodge — was not on the dates in question the bona fide representative of a majority of its employees and entitled to bargain for them; and,

(f) That petitioner did not, directly or indirectly, participate in the organization of the Rare Metal Workers of America, Local No. —, and did not encourage membership therein or contribute to its support or, in any degree, dominate or interfere with the conduct of its affairs.

HEARING BY TRIAL EXAMINER

5. From — — to — —, 19—, a hearing was conducted by a Trial Examiner designated by the Board. His intermediate report was filed with the Board on — —, 19—, recommending a cease and desist order against the petitioner and a requirement that petitioner bargain with Lodge —, withdraw recognition from Rare Metal Workers of America, Local No. —, reinstate with back pay all but — of the persons named in the complaint and place the remaining — on a preferred list for re-employment. The petitioner excepted to the intermediate report in its entirety and Lodge — excepted to the portion of the report dealing with the — men recommended for a preferred list.

ORDER TO BE REVIEWED

6. On — —, 19—, the Board entered its decision and order. The order directed to the petitioner, for a review of which this petition is filed, was as follows:

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Fansteel Metallurgical Corporation, its officers, agents, successors and assigns shall:

"1. Cease and desist from:

"(a) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section — of the Act;

"(b) Dominating or interfering with the formation or administration of Rare Metal Workers of America, Local No. 1, or any other labor organization of its employees, or contributing support to any such labor organizations;

"(c) Refusing to bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of its hourly paid employees, excluding laboratory and engineering employees, supervisory employees, and clerical employees.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Upon request bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of its hourly paid employees, excluding laboratory and engineering employees, supervisory employees, and clerical employees;

"(b) Upon application, offer to those employees who went on strike on February 17, 1937, and thereafter, immediate and full reinstatement to their former positions, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, all persons hired since February 17, 1937;

"(c) Make whole all employees who went on strike on February 17, 1937, and thereafter, for any losses they may suffer by reason of any refusal of their application for reinstatement in accordance with the preceding paragraph, by payment to each of them of a sum of money equal to that which each of them would normally have earned as wages during the period from the date of any such refusal of their application to the date of the offer of reinstatement, less the amount, if any, which each, respectively, earned during said period;

"(d) Withdraw all recognition from Rare Metal Workers of America, Local No. 1, as a representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and completely disestablish Rare Metal Workers of America, Local No. 1, as such representative;

"(e) Post immediately in conspicuous places in its plant at North Chicago, Illinois, and maintain for a period of at least thirty (30) con-

secutive days, notices to its employees stating that the respondent will cease and desist in the manner aforesaid, and that recognition is withdrawn from the R. M. W. A. as ordered above;

"(f) Notify the Regional Director for the Thirteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

"And it is further ordered that the complaint be, and it hereby is, dismissed in so far as it alleges that the respondent has engaged in unfair labor practices within the meaning of Section 8 (3) of the Act."

PRINCIPAL ERRORS RELIED UPON

7. The above-quoted order entered by the Board on — —, 19—, in the above-mentioned proceedings, entitled "In the Matter of Fansteel Metallurgical Corporation and Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, Case No. C-235," and that portion of the decision, findings of fact, and conclusions of law, upon the basis of which said order was entered (excepting only the provision of the order dismissing the charge that petitioner engaged in unfair labor practices within the meaning of section 8 (3) of the act and the findings of fact and conclusions of law upon which such provision is based), are erroneous and contrary to law and should be set aside, for the following reasons, to wit:

(a) The Board's conclusions of law, upon which said order was based, are erroneous.

(b) So much of the Board's decision and findings of fact as form the basis for said order are not supported by, and are in fact contrary to, the evidence.

(c) The — persons named in the complaint who participated in the seizure and retention of petitioner's plant were discharged on — —, 19—, by reason of their unauthorized and unlawful seizure and retention of the buildings and for no other reason whatsoever. The Board found, in its decision, that the dismissal of these men did not constitute a "discriminatory discharge." These men, having been properly discharged, were no longer employees of the petitioner, and the Board's order that these men be reemployed in their former positions by the petitioner, upon their application, is inconsistent with the Board's own findings, unsupported by the evidence, contrary to law, and should be set aside.

(d) The men who unlawfully seized two key buildings of petitioner's plant on — —, 19—, were enabled to retain possession thereof through the furnishing of food, bedding, and other supplies by certain employees of the petitioner and others who remained on the outside of the plant. The Board found that the persons aiding and abetting the illegal retention of possession of petitioner's buildings during the so-called "sit-down" strike, who did not return to work upon the reopening of the plant, had voluntarily absented themselves from their employment and had never applied for

reinstatement. — such employees were named in the complaint. The petitioner was not, and is not, under any duty or obligation to offer to such employees so participating in the illegal retention of petitioner's plant reinstatement to their former positions. The Board's order that, upon application, the petitioner grant reinstatement to such persons is unsupported by the evidence, is contrary to law and should be set aside.

(e) The persons named in the complaint were either discharged on — —, 19—, for their illegal seizure and retention of petitioner's plant or voluntarily absented themselves from the petitioner's employment to engage in a so-called "strike." The Board properly found that petitioner did not refuse re-employment to any of the persons named in the complaint, no application therefor having been made. Such strike began — months prior to the entry of the aforementioned order by the Board and no showing was made, and there is no evidence in the record, that the strike, in connection with which the persons named in the complaint voluntarily ceased work, is, or constitutes, a "current labor dispute" as required by the National Labor Relations Act. The record shows that upon reopening of the plant the petitioner replaced such of its former employees as failed to apply for re-employment with new employees and accordingly its plant was, at the time of the filing of the complaint herein, completely manned. The Board's order directing the petitioner, upon application, to re-employ its former employees who had voluntarily ceased work, some of whom had thereafter been properly discharged, and who for — months prior to the entry of the Board's order had voluntarily absented themselves from their employment is not supported by the evidence, is contrary to law and should be set aside.

(f) The evidence revealed that the petitioner had itself performed certain maintenance and construction work and the manufacture of certain dies needed in its operations, all of which work could be more economically obtained through the services of independent contractors especially equipped to perform the required services. Upon the reopening of the plant, the petitioner, acting solely in the interest of more economical operations, completely abolished certain of the tool making and building and maintenance positions formerly occupied by certain of the persons named in the complaint. The functions of the positions so abolished have not, since the reopening of the plant by the petitioner, been performed by any employees of the petitioner. The Board's order directs that the petitioner re-establish the positions abolished, re-employ, upon application, the persons formerly occupying such positions who went on strike — —, 19—, and after such re-employment carry out the economy reforms previously undertaken. Such order and the failure to pass directly upon the petitioner's contention that it is under no duty to offer re-employment to persons whose positions have been abolished in the interest of efficiency and whose functions are no longer being performed by any employee of the petitioner, would defeat the purposes of the National Labor Relations Act by engendering industrial strife and unrest and thereby burdening or

obstructing interstate commerce; the order is unsupported by the evidence, is contrary to law and should be set aside.

(g) The petitioner's amended answer averred, and the evidence showed, that certain of the persons named in the complaint had not, prior to the closing of the plant, conducted their work with satisfactory efficiency and that accordingly the petitioner was under no duty to offer, either upon application or otherwise, reinstatement to such persons. The evidence further showed that the persons in this category had not actively or otherwise participated in the so-called "sit-down" strike or in any union activity, and membership which any of them may have had in Lodge — was unknown to the petitioner. The Board's order directs that the petitioner upon application, reinstate all such persons and after such reinstatement discharge them if their rate of efficiency be not satisfactory. Such order and the failure to pass directly upon the petitioner's contention that it is under no duty to offer re-employment to such inefficient persons would defeat the purposes of the National Labor Relations Act by engendering industrial strife and unrest and burdening or obstructing interstate commerce; the order is unsupported by the evidence, is contrary to law and should be set aside.

(h) Lodge — was not on — —, 19— or — —, 19—, or at any time thereafter, the bona fide representative of a majority of the employees of the petitioner within the unit found by the Board in its decision to be appropriate for the purposes of collective bargaining. The order of the Board directing the petitioner to cease and desist from refusing to bargain collectively with Lodge — as the exclusive representative of its hourly employees, and upon request to bargain collectively with said union, is not supported by the evidence, is contrary to law, and should be set aside.

(i) The finding that petitioner engaged in unfair labor practices prior to — —, 19—, by interfering with, restraining and coercing its employees in the exercise by the employees in their right to self-organization is unsupported by the evidence. Accordingly, the order of the Board that the petitioner cease and desist from interfering with, restraining, or coercing its employees in their rights to self-organization, as guaranteed in section 7 of the National Labor Relations Act, is contrary to law, and should be set aside.

(j) Rare Metal Workers of America, Local No. —, is a labor organization formed by the employees of the petitioner in —, 19—. The evidence shows that no member of petitioner's management aided, encouraged, or in any respect participated in the organization of the union or solicitation of membership or the conduct and management of its affairs, and that no pressure or coercion of any kind was exerted upon any employees to induce them to join or refrain from joining the union. The Board's order that the petitioner cease and desist from dominating or interfering with the formation or administration of Rare Metal Workers of America, Local No. —, or any other labor organization of its employees, or contributing

support thereto, and the Board's order that the petitioner withdraw all recognition from Rare Metal Workers of America, Local No. —, as to representation of its employees for the purpose of collective bargaining, are not supported by the evidence, are contrary to law, and should be set aside.

ORDER EXCEEDS BOARD'S STATUTORY AUTHORITY AND CONTRAVENES
FEDERAL CONSTITUTION

8. The Board's order, in the respect set out in this paragraph 8, exceeds the authority conferred upon the Board by the National Labor Relations Act. The statute limits affirmative action to such orders as "will effectuate the policies of this Act." If construed to authorize the instant order, the National Labor Relations Act would contravene the provisions of the Constitution of the United States guaranteeing due process of law.

(a) The so-called "sit-down" strike, involving the seizure and retention of an employer's property by employees, is illegal, whether undertaken to enforce alleged rights under the National Labor Relations Act or otherwise. Neither the National Labor Relations Act nor any other law deprives an employer of the right to discharge employees who participate in such illegal plant seizure. The petitioner discharged all of the employees who seized and refused to surrender petitioner's plant, and, after such proper discharge, persons occupying the plant were no longer employees within the meaning of that term under the National Labor Relations Act. The Board was without authority in law to order reemployment by the petitioner of the men who had been so discharged for good cause.

(b) The sit-down strikers: First. Forcibly retained possession of petitioner's plant for — days in open defiance of the Circuit Court injunction, second, on two separate occasions resisted, with violence, the sheriff's efforts to enforce the injunctive order, and on both occasions hurled heavy bolts, tools, iron missiles, and quart jars of sulphuric acid at the sheriff and his deputies, injuring several of them, and third, in resisting the law officers, deliberately broke windows, injured the building and destroyed tools and inventory. — sit-down strikers were convicted of contempt and received fines and jail sentences varying from — days to — months. In ordering the reinstatement of these sit-down strikers, the Board says:

"We have, in some cases, declined to order reinstatement of striking employees despite the fact that the strike was caused by the employer's unfair labor practices. In one such case, the striker in question had been indicted for shooting and wounding a fellow employee during the course of the strike. In another, six strikers had pleaded guilty to a felony involving conspiracy to destroy property, and two had pleaded guilty to the felony of stealing dynamite and converting it to their own use; all eight had been sentenced to a maximum of ten years in jail. It cannot be said that the conduct of the strikers in the present case is analogous to the conduct in these instances. They were not engaged in sabotage."

The Board's order of reinstatement apparently rests upon the failure of the sit-down strikers to inflict fatal injuries and receive long-term sentences. The National Labor Relations Act does not and could not constitutionally deprive petitioner of its right to refuse employment to men engaged in the destruction of property and deadly violence whether or not these men were indicted for, or convicted of, felonies.

(c) The jobs formerly occupied by certain of the persons named in the complaint were abolished upon the reopening of petitioner's plant. The undisputed evidence shows that such internal reorganization was effected solely for economical and competitive reasons and in no way related to union membership or activity of any of petitioner's employees. In ordering that petitioner re-establish the abolished positions, re-employ the persons who had formerly occupied them and then carry out a new internal reorganization, the Board has exceeded its authority under the National Labor Relations Act.

(d) The record shows that after the discharge, on —, 19—, of the employees who seized and withheld the petitioner's plant, Lodge — did not represent a majority of petitioner's employees. The Board's order nevertheless requires that petitioner now recognize Lodge — as the exclusive bargaining representative for all of its employees. The Board's decision indicates that this portion of the order is imposed upon the petitioner as a penalty for failing to recognize Lodge — as sole bargaining representative in —, 19—. The Board is without authority in law either to impose a penalty or to designate a bargaining representative contrary to the desires of petitioner's employees.

9. The Board's order requires that petitioner: First. Reemploy persons who had been discharged for their violent and illegal seizure and retention of petitioner's plant and who thereafter, by their illegal conduct and violent resistance to the law enforcement officers, destroyed petitioner's property and otherwise damaged petitioner in an approximate amount of — dollars (\$—), and second, reinstate employees who aided and abetted in the illegal retention of petitioner's plant and in the resultant destruction of property and other damage to the petitioner in the approximate amount of — dollars (\$—). No restitution for such damage has been offered by the employees and discharged employees occasioning the same and none has been required by the Board as a condition of re-employment and reinstatement. By reason of the foregoing, the Board's order constitutes a deprivation of petitioner's property in violation of the provisions of the Constitution of the United States guaranteeing due process of law and accordingly is contrary to law, null, and void and should be set aside.

DENIAL OF DUE PROCESS IN HEARING BY BOARD

10. In its conduct of the proceedings above-described resulting in the entry of the aforementioned order, the Board denied to the petitioner its constitutional right to due process of law in the following respects, to wit:

(a) By the refusal of the Board and the Trial Examiner to grant petitioner's application for subpoenas and subpoenas duces tecum, the petitioner was hampered and unduly prejudiced in the presentation of evidence and was prevented from adducing and presenting evidence in accordance with the National Labor Relations Act and the constitutional guaranty of due process of law. Petitioner's application, which complied with the regulations of the Board and was filed together with the answer, sought: First. Subpoenas for the persons named in the complaint as having been discharged and refused re-employment by the petitioner by reason of union membership and union activity, second, a subpoena for a conciliator of the United States Department of Labor having information respecting violence and threatened violence by certain of the persons named in the complaint, and third, subpoenas duces tecum directed to Lodge — for the production at the hearing of its minute books, books of account, check books, membership cards, books and lists, and correspondence relating to the solicitation of members among the petitioner's employees and relating to the participation of Lodge — or its officers and members in the seizure and retention of petitioner's plant. The application showed that the last-named documents were sought to establish the number and status of the membership of Lodge — from — —, 19— to the date of the hearing, the use by Lodge — of violence and other illegal duress to compel employees of the petitioner to accept membership therein, and the participation of Lodge — in the conspiracy to seize and retain petitioner's plant and otherwise to engage in violence. After the hearing had been in progress more than a week, the Board entered an order denying in its entirety petitioner's application for subpoenas. During the hearing, witnesses for the Board testified orally on matters contained in the written records which petitioner sought to have produced by the subpoenas duces tecum it requested. The petitioner thereupon requested, without avail, that subpoenas be issued forthwith for use in cross-examining such witnesses and in contradicting their testimony. By the repeated refusal of the Board and Trial Examiner to issue subpoenas, petitioner was deprived of an opportunity for a full and fair hearing as guaranteed by the National Labor Relations Act and the due process provisions of the Constitution of the United States.

(b) During the hearing before the Trial Examiner, the attorney for the Board had in his possession numerous subpoenas signed in blank by the Board which such attorney was enabled to, and did, use, without application to the Board and without limitation, to obtain witnesses and evidence in support of the Board's complaint. The hearing lasted — days, and several hours after it had been entirely closed, the Trial Examiner on his own motion, reopened the hearings, advising petitioner that the Board had authorized its trial attorney to fill in one of the blank subpoenas in his possession for a limited portion of the membership records of Lodge — sought by the application, and a subpoena directed to the aforementioned conciliator of the Department of Labor who was admittedly not

then available for service. Such belated and limited action did not and could not cure the prejudice caused to the petitioner because: First. The hearing had terminated and the numerous witnesses who testified as to the contents of the records were not available for cross-examination, and second, the extent of the subpoena so granted to the petitioner after the termination of the hearing was so limited in scope as to be wholly insufficient to meet the purposes of the petitioner in seeking the issuance of the same.

(c) Throughout the proceeding the Board exhibited hostility and prejudice against the petitioner and unmistakable partisanship in favor of Lodge ——. Notwithstanding that the same parties, the same counsel and the same witnesses were engaged in trial before the Circuit Court of — County on contempt proceedings, the Board and the Trial Examiner denied petitioner's motion to adjourn the hearing until the completion of the court trial. Only the intervention of an injunction restraining interference with the judicial proceeding saved the petitioner from the necessity of going forward in two separate proceedings on substantially the same subject matter at the same time.

(d) Witnesses for the Board were permitted to testify from memory as to the contents of records in their possession, for which subpoenas had been refused by the Board, and the Trial Examiner encouraged such witnesses to refuse voluntarily to produce such records. Throughout the hearing he sought to limit and minimize the testimony respecting violence and other illegal acts attendant upon the sit-down strike. While limiting the cross-examination by the petitioner to the subject-matter of the direct examination, the Trial Examiner extended to the Board wide and unlimited scope upon cross-examination.

ORDER IS AMBIGUOUS AND CONTRARY TO PURPOSES OF NATIONAL
LABOR RELATIONS ACT

11. By its ambiguity and its failure to pass upon and give effect to: First. The complete abolition of certain jobs in the petitioner's plant, second, the substantial modification in pay rates and other conditions relating to certain other jobs in petitioner's plant, and third, the drastic curtailment in number of employees resulting from the current business depression, the Board's order would, if enforced, defeat the purposes of the National Labor Relations Act by engendering industrial strife and unrest, require additional and further proceedings before the Board on matters now in evidence in this record, and otherwise burden and obstruct interstate commerce.

Wherefore, — Metallurgical Corporation petitions this honorable court for a review of the aforementioned order entered by the Board of — —, 19—, in proceedings entitled "In the Matter of Fansteel Metallurgical Corporation and Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, Case No. C-235," and your petitioner respectfully prays:

(1) That the Board be directed to certify and deliver to your petitioner a transcript of the entire record in the aforementioned proceeding before the Board;

(2) That the petitioner may be granted leave to file such certified record in the proceedings before the Board within a reasonable time to be fixed by this honorable court; and

(3) That the aforesaid order of the Board be set aside and held for naught and that your petitioner, its officers, agents, and representatives, be relieved by order of this honorable court from the necessity of complying therewith.

And your petitioner will ever pray.

Metallurgical Corporation,

President.

Counsel for petitioner.

STATE OF _____, }
COUNTY OF _____. } ss:

_____, being first duly sworn, on oath deposes and says that he is the president of Metallurgical Corporation, the petitioner in the above and foregoing petition, and makes this affidavit on its behalf; that he has read the foregoing petition by him subscribed and has knowledge of the contents thereof and that the statements of fact made in the above and foregoing petition are true to the best of his knowledge and belief.

Sworn to and subscribed before me this _____ day of _____, 19____.

[SEAL]

Notary Public in and for the county
and state aforesaid.

Source of Form.

Taken from record in National Labor Relations Bd. v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. ed. 627, 59 Sup. Ct. 490, 123 A. L. R. 599.

Statutory Reference.

Petition for review; jurisdiction; venue; transcript of record, 9 F. C. A., Title 29, § 160 (f); U. S. C. A., Title 29, § 160 (f); id. U. S. C.

Cross-Reference.

See notes to Forms 990, 997-999.

NOTES TO DECISIONS

In General.

9 F. C. A., Title 29, § 160 (e) (f); U. S. C. A., Title 29, § 160 (e) (f); id. U. S. C. investing court with jurisdiction to review an order of the board on its merits only upon the filing of a transcript exhibiting the board's final action is not a denial of due process. In re National

Labor Relations Bd., 304 U. S. 486, 82 L. ed. 1482, 58 Sup. Ct. 1001.

Where board had not supplied specific findings upon points in controversy to sustain its order, court did not err in setting aside order for reinstatement. National Labor Relations Bd. v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L.

ed. 627, 59 Sup. Ct. 490. Modg. & affg. (C. C. A. 7), 98 Fed. (2d) 375.

Respondent can not claim that it was denied due process of law on a claim that it was denied the substance of notice and hearing before the board when there is no record of objection made on that ground. The contention is not reviewable. National Labor Relations Bd. v. American Potash & Chem. Corp. (C. C. A. 9), 98 Fed. (2d) 488. Cert. den. 306 U. S. 643, 83 L. ed. 1043, 59 Sup. Ct. 582.

A "determination" or "decision" by an administrative body may be definitive, may be legal, and may be binding as to all parties concerned, but it is still not an "order" if it does not also command or direct a particular thing to be done, and, because it is not an "order," it is not appealable and is subject to judicial review only by bill in equity. American Federation of Labor v. National Labor Relations Bd., 70 App. D. C. 62, 103 Fed. (2d) 933.

1001. Petition for Enforcement of an Order of National Labor Relations Board.

United States Circuit Court of Appeals for the

— Circuit

— Term, 19—

National Labor Relations Board,
Petitioner,
v.
— Carbon Company,
Respondent.

No. —

To the Honorable the Judges of the United States Circuit Court of Appeals for the — Circuit:

The National Labor Relations Board, pursuant to the authority conferred upon it by an Act of Congress approved July 5, 1935 (49 Stat. 449, ch. 372, U. S. C., Title 29, section 151 et seq.), known as the "National Labor Relations Act," respectfully petitions this honorable court for the enforcement of a certain order issued by the Board in a proceeding by it against respondent, — Carbon Company. Said proceeding is known upon the records of the Board as Case No. —, the title thereof being "In the Matter of Stackpole Carbon Company and United Electrical & Radio Workers of America, Local No. 502."

In support of this petition, the Board respectfully shows:

(1) Respondent is and at all times hereinafter mentioned was a corporation organized under and existing by virtue of the laws of the commonwealth of —, having its principal office and place of business in —, —.

(2) By reason of the matters alleged in paragraph (1) hereof, this court has jurisdiction of this petition by virtue of section 10 (e) of the National Labor Relations Act.

(3) A charge having been filed on — —, 19—, by United Electrical & Radio Workers of America, Local No. —, hereinafter called the "Union," the Board, by its Regional Director for the — Region, issued,

on — —, 19—, its complaint in said Case No. —, alleging that respondent had been and was engaging in certain unfair labor practices affecting commerce within the meaning of the act. A hearing was noticed for — —, 19—, but postponed, by successive notices, to — —, 19—. Respondent filed an answer, dated — —, 19—.

(4) On — —, 19—, the Board made an order designating — Trial Examiner.

(5) Thereafter, on — —, —, — through —, —, through —, and —, through —, 19—, a hearing was held before said Trial Examiner in —, —. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties.
* * *

(6) Said Trial Examiner filed an intermediate report, dated — —, 19—, in which, after denying Board counsel's motion to conform the pleadings to the proof, referred to in paragraph (5) above, he concluded that respondent had engaged and was engaging in certain unfair labor practices affecting commerce within the meaning of the act and made certain recommendations.

(7) Thereafter, the Union and respondent each filed exceptions to the intermediate report.

(8) Thereafter, on — —, 19—, the Board, being sufficiently advised in the premises and being of the opinion, upon all the testimony and evidence, that respondent had engaged and was engaging in certain unfair labor practices affecting commerce within the meaning of the act, reversed the Trial Examiner's ruling on Board counsel's motion that the pleadings be amended to conform to the proof, referred to in paragraphs (5) and (6) above, and granted the motion and stated its findings of fact and conclusions of law and entered the following order, directed to respondent and its officers, agents, successors, and assigns: * * *

(9) Thereafter, on — —, 19—, the decision and order herein was served upon respondent by sending a copy thereof postpaid, bearing government frank by registered mail to —, respondent's attorneys, in —, —.

(10) Said order of the Board, set forth in paragraph (8) above, is and at all times since its issuance has been in full force and effect.

Wherefore, the Board petitions this honorable court for the enforcement of its order of — —, 19—, set forth in paragraph (8) above, and pursuant to section 10 (e) of the National Labor Relations Act, is certifying and filing with this court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

The Board prays this honorable court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made

thereupon a decree enforcing in whole said order of the Board and requiring respondent and its officers, agents, successors, and assigns to comply therewith.

Chairman.

Member.

Member.

National Labor Relations Board.

Dated at —, —, this — day of —, 19—.

Acting general counsel.

District of Columbia, ss:

—, — and —, being first duly sworn, state that they constitute the National Labor Relations Board; that they have read the foregoing petition subscribed by them and have knowledge of the contents thereof; and they further on oath say that the statements made therein are true to the best of their knowledge and belief.

Chairman.

Member.

Member.

Subscribed and sworn to before me this — day of —, 19—.

Notary Public, District of Columbia.

My commission expires — —, 19—.

[SEAL]

Cross-Reference.

See notes to Forms 990, 999, 1000.

record, 9 F. C. A., Title 29, § 160 (e);
U. S. C. A., Title 29, § 160 (e); id. U.
S. C.

Statutory Reference.

Petition to courts to enforce order;
jurisdiction; venue; notice; transcript of

NOTES TO DECISIONS

In General.

On petition by board for enforcement of its order, the court is required to make its order in accord with the board's, unless on the hearing, it be shown that the evidence on which the order was based does not warrant it. National Labor Relations Bd. v. Biles Coleman Lbr. Co. (C. C. A. 9), 96 Fed. (2d) 197.

Proceedings to enforce an order of the board are judicial, upon petition to the court and filing transcript of record, and the court may insist upon relevant, material, and competent evidence. National Labor Relations Bd. v. Bell Oil & Gas Co. (C. C. A. 5), 98 Fed. (2d) 406.

1002. Petition for Leave to Intervene.

United States District Court of Appeals for
the _____ Circuit
_____ Term, 19—

National Labor Relations Board,
Petitioner,
v.
____ Carbon Company,
Respondent.

No. —

PETITION OF WORKERS' SECURITY UNION, ON BEHALF OF ITSELF AND ITS
MEMBERS, FOR LEAVE TO INTERVENE

To the Honorable Judges of the United States Circuit Court of Appeals
for the — Circuit:

Your petitioner, Workers' Security Union, acting for and on behalf of itself and its members, whose names and addresses are set forth in the annexed schedule, "Exhibit A" files this, its petition for leave to intervene in the above-entitled proceeding, and in support of such petition, respectfully alleges:

1. Your petitioner, Workers' Security Union, is a voluntary association, with offices at —, — County, —, which was organized on — —, 19—, and now exists for the purpose, among other lawful purposes, of representing the employees of the above-named respondent, — Carbon Company, in negotiating and bargaining on behalf of said employees with respect to wages, rates of pay, hours of work, conditions of employment, grievances, and other matters of interest to said employees and pertaining to their employment.

2. Your petitioner was organized by employees working in the plants of the said respondent, situated at —, and —, in — County, in the — District of —, and its membership is confined to persons employed in the production and maintenance departments of said plants, exclusive of persons employed in clerical, supervisory or executive capacities. Your petitioner has, at all times, been and now is, in all respects, an independent, bona fide labor organization and a duly qualified representative of the employees of said respondent, within the meaning and intent of the National Labor Relations Act.

3. As will appear from the record in the above-entitled proceeding, the National Labor Relations Board, on — —, 19—, issued a complaint against the respondent, alleging that the respondent had been and was engaging in certain unfair labor practices, within the meaning of the National Labor Relations Act; that thereafter, between — — and — —, 19—, the said Board held a hearing upon such complaint in —, —; and that following such hearing, the said Board issued a certain decision and order, under date of — —, 19—, in which the said Board

purported to make a finding of fact that a certain organization or association, known as "United Electrical & Radio Workers of America, Local 502," was, on — — —, 19—, and on — — —, 19—, the duly designated representative of the majority of the respondent's employees in the appropriate unit. Your petitioner has no knowledge as to whether or not the finding of fact was or is correct as applied to such dates, but petitioner is advised by its attorneys, and therefore states, that such finding is immaterial and inconclusive with respect to your petitioner, by reason of the fact that such finding relates to transactions occurring on or before — — —, 19—, before petitioner was organized, and circumstances have changed since that date.

4. Your petitioner has investigated, to the best of its ability, the number of persons now employed in the production and maintenance departments of the respondent's plants, exclusive of persons employed in clerical, supervisory, or executive capacities, and petitioner alleges that, to the best of its knowledge, information, and belief, there were 606 persons so employed on — — —, 19—, that approximately the same number is now employed as aforesaid, and that all of such persons were so employed on and before — — —, 19—.

5. Of the persons now employed in the production and maintenance departments of respondent's plants, as aforesaid, — — — have become and now are members in good standing of your petitioner, and have designated and have continued to designate your petitioner as their authorized representative, for the purposes of collective bargaining with the respondent, within the meaning of the National Labor Relations Act. Your petitioner is advised by its attorneys and therefore states that, by reason of such facts, your petitioner has been and is entitled to represent all of the persons employed in the production and maintenance departments of the respondent's plants, for the purposes of collective bargaining, as aforesaid, and that no other organization or association is entitled, under the law, to represent all or any of said persons. Your petitioner also alleges that a true and correct list of its members, in good standing, as aforesaid, is attached to this petition, marked "Exhibit A," and made a part hereof.

6. The members of your petitioner, whose names appear in the attached list, "Exhibit A" have heretofore specifically authorized and instructed your petitioner, acting through its officers, to attempt to negotiate an agreement with respondent, with respect to the wages, rates of pay, hours of work, conditions of employment, and procedure for the adjustment of grievances, and your petitioner, pursuant to such instruction and authorization, has demanded that the respondent enter into such an agreement.

7. As will appear from the record in the above-entitled proceeding, the National Labor Relations Board, has made an order against the respondent, providing, in part, that the respondent should * * *

8. Your petitioner states upon the advice of its counsel, that the enforcement of the foregoing portions of the order of the National Labor Relations Board, which the Board has asked your honorable court to

enforce, will cause irreparable injury to your petitioner, in that it will deprive your petitioner of its rights under the law to represent its members and all of the persons employed in the production and maintenance departments of the respondent's plants, as aforesaid, for purposes of collective bargaining.

9. Your petitioner states, upon the advice of its attorneys, that the foregoing order is based upon the finding of fact described in Paragraph 3 hereof, that such finding of fact relates to transactions occurring on or before —, 19—, before your petitioner was organized, and that, by reason of the remoteness in time of such finding of fact and changes in circumstances since such time, the enforcement of such order would be contrary to law and would result in great hardship to your petitioner and its members, all of whom were employed on and before —, 19—, and all of whom have designated your petitioner, as their representative for purposes of collective bargaining, as hereinbefore alleged. * * *

10. Your petitioner, upon the advice of its attorneys, alleges that, by reason of the matters hereinbefore set forth, your petitioner, and its members, have an interest in these proceedings and are entitled to intervene herein, for the purpose of protecting such interest.

Wherefore, your petitioner, on behalf of its members, and acting by and through its duly authorized officers, prays that your honorable court grant them leave to intervene, in the above-entitled proceeding, and to take such part therein as your honorable court may consider just and appropriate for the purpose of protecting its and their interests.

Workers' Security Union.

By _____

Organizing committee.

Attorney for petitioner.

STATE OF _____, }
COUNTY OF _____. } ss:

Before me, the undersigned, a Notary Public authorized to administer oaths in the county and state aforesaid, personally appeared —, —, —, —, —, —, and —, who are to me personally known, and who, being duly sworn, did depose and say that they are the organizing committee of the petitioner, Workers' Security Union, and are duly authorized to make this affidavit upon its behalf and on behalf of its members; that they have read over the attached petition and have knowledge of the facts and matters set forth therein; and that the statements of fact herein made are true and correct, to the best of their knowledge, information, and belief.

Subscribed and sworn to before me this — day of —, 19—.

Notary public.

Cross-Reference.

See notes to Form 990.

Rules and Regulations of the National Labor Relations Board.

Intervention, form and requirements of petition; ruling thereon; service thereon, Art. 2, § 19.

Statutory Reference.

Right to intervene in proceedings before the board, 9 F. C. A., Title 29, § 160 (b); U. S. C. A., Title 29, § 160 (b); id. U. S. C.

1003. Decree Granting Leave to Intervene.

(Caption.)

And now, this — day of —, 19—, upon motion of —, Esq., the prayer of the petition of the Workers' Security Union for leave to intervene in the above-entitled proceedings, is hereby granted.

By the court: _____

Cross-Reference.

See notes to Forms 990, 1002.

1004. Petition for Rehearing.

(Caption.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the — Circuit:

Comes now — Carbon Company, respondent in the above-entitled cause, and presents this, its petition for a rehearing, and in support thereof, respectfully sets forth:

1. On — —, 19—, the National Labor Relations Board (referred to herein as the "Board") issued its complaint against — Carbon Company (referred to herein as the "Respondent"), alleging Respondent had engaged in unfair labor practices within the meaning of section 8 (1), (2) and (5), and section 2 (6) (7) of the National Labor Relations Act, 49 Stat. 449, ch. 372 (U. S. C., Title 29, section 151 et seq.), and a hearing thereon was held at —, —, from — — to — —, 19—, before a Trial Examiner. The Trial Examiner, under date of — —, 19—, filed his intermediate report with the Board, whereupon respondent filed its exceptions thereto and on — —, 19—, the Board stated its findings of fact, conclusions of law, and entered an order against Respondent.

2. Following receipt of the order made by the Board, Respondent filed with the Regional Director, — Region of the National Labor Relations Board, —, —, a notice of partial compliance with the decision and order of the Board, in which notice, the Respondent, without conceding that it had committed the unfair labor practices which the Board found to have been committed, notified the Board that it had complied, and was complying, with paragraphs 1 (b), 1 (c) and 2 (a) of the Board's order, as follows: * * *

3. Thereafter, in —, 19—, the Board presented to this honorable court its petition for enforcement of its order in full, and after the filing of the record and briefs of the respective parties, such petition came up for argument and was argued before this honorable court on — —, 19—.

4. On — —, 19—, this honorable court filed its opinion, holding that the Board's order should be enforced, except the aforesaid paragraphs 1 (d), 2 (b) and reference to paragraph 1 (d) appearing in paragraph 2 (e), which this court ordered stricken from the Board's said order.

5. Respondent respectfully submits that the court's opinion fails to give any recognition to the fact that respondent had complied with several portions of the Board's order before the Board filed its petition for enforcement; that the greater part of the court's opinion is devoted to a discussion of the facts and law relating to issues involved in portions of the order which had already been complied with; and that as a consequence the Respondent has been placed in the position of being directed by this court to cease and desist from engaging in activities and to abrogate and cancel a relationship and an agreement, which no longer existed. * * *

Wherefore, upon the foregoing grounds and for the reasons hereinbefore set forth, it is respectfully urged that this petition for rehearing be granted, and that the order of the Board as now affirmed by this honorable court be, upon further consideration, reversed.

Respectfully submitted,

Attorneys for — Carbon Company, Respondent.

CERTIFICATE OF COUNSEL

We, — and —, of —, —, — & —, hereby certify that we are the attorneys and of counsel for — Carbon Company, the respondent in the above-entitled proceeding, and that the foregoing petition for rehearing is not presented for purposes of delay or vexation, but is, in our opinion, well founded in law and fact and proper to be filed herein.

Attorneys for — Carbon Company, Respondent.

Cross-Reference.

See notes to Form 990, 1000.

1005. Decree of Circuit Court of Appeals.

(Caption.)

This cause coming on to be heard upon the petition of the National Labor Relations Board for the enforcement of an order of the Board against the

above-named respondent, and the court having heard arguments of counsel for the respective parties hereto and being fully advised in the premises,

It is ordered, adjudged, and decreed that the respondent, — Carbon Company, —, —, and its officers, agents, successors, and assigns shall:

1. Cease and desist:

(a) From in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in section 7 of the National Labor Relations Act.

(b) From in any manner dominating or interfering with the administration of the — Employees' Association of —, —, or with the formation or administration of any other labor organization of its employees, and from contributing financial or other support to — Employees' Association of —, —, or any other labor organization of its employees.

(c) From giving effect to its contract with the association.

2. Take the following affirmative action for the effectuation of the policies of the act:

(a) Withdraw all recognition from — Employees' Association of —, —, as a representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and completely disestablish said association as such representative.

(b) Upon application, offer to its employees who were employed on — —, 19—, and who struck on — —, 19—, or thereafter, immediate and full reinstatement to their former positions at either its —, —, plant or its —, —, plant, without prejudice to their seniority and other rights and privileges, dismissing if necessary, persons hired on or after — —, 19—.

(c) Make whole all employees who went on strike on — —, 19—, and thereafter, for any losses they may suffer by reason of any refusal of their application for reinstatement in accordance with paragraph 2 (b) herein, by payment to each of them respectively, of a sum equal to that which each would normally have earned as wages during the period from the date of any such refusal of their application to the date of reinstatement, less the amount, if any, which each, respectively earned during said period.

(d) Post immediately notices to its employees in conspicuous places throughout its plant, stating: First. That the respondent will cease and desist as provided in paragraphs 1 (a), (b), and (c) of this decree; second, that the respondent withdraws and will refrain from all recognition of — Employees' Association of —, —, as a representative of its employees, and completely disestablishes it as such representative; third,

that the agreement signed with — Employees' Association of —, —, —, is void and of no effect.

(e) Maintain such notices for at least — consecutive days from the date of posting; and

(f) Notify the National Labor Relations Board's Regional Director for the — Region in writing within — days from the date of this decree what steps the respondent has taken to comply herewith.

By order of the court.

Circuit Judge.

Cross-References.

See notes to Forms 980, 990, 999-1001.

CHAPTER 32

SECRETARY OF AGRICULTURE

Form		Form	
1015.	Complaint to enjoin violation of order of Secretary of Agriculture.	1017.	Answer in action to enjoin order of Secretary of Agriculture.
1016.	Complaint to enjoin enforcement of orders of Secretary of Agriculture (cotton quota).	1018.	Motion by United States for leave to intervene.
		1019.	Order granting leave to intervene.
		1020.	Answer of United States as intervening defendant.

INTRODUCTION.—The Department of Agriculture was created by an Act of Congress approved May 15, 1862, 12 Stat. 387. Until 1889 it was administered by a Commissioner of Agriculture. In recent years the powers and duties of the department have been greatly enlarged. In addition to disseminating useful information on subjects connected with agriculture, it administers a large number of regulatory laws, such as the Meat Inspection Act, the Packers and Stock Yards Act, etc., as well as various national recovery measures affecting agriculture.

A number of important decisions were recently rendered affecting procedure to be followed by the secretary. From among these might be mentioned the case of *Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288, 56 Sup. Ct. 906. Consequently, procedural forms for use in connection with the review or enforcement of orders of the department have become of increasing importance—hence their inclusion in this work.

1015. Complaint to Enjoin Violation of Order of Secretary of Agriculture.

United States of America and —, }
Secretary of Agriculture, }
Plaintiffs, }
v. }
— & Sons, Inc., and — Milk }
Company, }
Defendants. }

No. —

1. Plaintiff — is the Secretary of Agriculture of the United States (hereinafter referred to as the "Secretary").

2. The defendant — & Sons, Inc. is a corporation organized and existing under the laws of the commonwealth of —, and has its principal place of business at — — Avenue in the city of — in said commonwealth.

2a. The defendant — Milk Company is a corporation organized and existing under the laws of the commonwealth of —, and has its principal place of business at — — Avenue in the city of — in said commonwealth. The plaintiffs are informed and believe that the defendant — Milk Company is a subsidiary of, and is controlled and dominated by, defendant — & Sons, Inc.

3. This proceeding is brought under section 8a (6) of the Act of May 12, 1933 (48 Stat. 31, U. S. C., Title 7, section 6078a (6), as amended August 24, 1934, 49 Stat. 672), and as re-enacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public No. 137, 75th Congress) (the said Act of May 12, 1933, as re-enacted and amended being hereinafter referred to as the "Act"), investing the several District Courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the secretary pursuant to the provisions of Title I of said act.

4. Pursuant to the provisions of sections 8b and 8c (3) of the act, the Secretary, on — —, 19—, gave notice of a public hearing on a proposed marketing agreement and a proposed order regulating the handling of milk in the area which includes the territory within the boundary lines of the cities and towns of —, * * * all in the commonwealth of — (the said area being hereinafter referred to as the "Boston Area").

5. In accordance with the terms of the said notice, a public hearing was held on — — and —, 19—, at —, —, and on — —, 19—, at —, —, at which times and places all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order. The said hearing was attended by representatives of producers, handlers, and consumers of milk sold in the Boston Area.

6. Upon evidence adduced at the said hearing the Secretary of Agriculture made all of the findings required by the applicable provisions of the act and, the President having approved the findings made by the Secretary pursuant to the provisions of section 8c (9) of the act, the Secretary, in accordance with the provisions of section 8c (1) (2), (4), and (9) of the act, issued Order No. — regulating the handling of milk in the Boston Area, effective — —, 19—, the said order containing terms and conditions authorized by the applicable provisions of the act and no others. A copy of the said order, marked "Exhibit B," is attached hereto and made a part hereof.

7. The purpose of said Order No. — is to promote, foster, and protect commerce in milk among the states and to effectuate the declared policy of the act by establishing and maintaining such orderly marketing conditions as will re-establish prices to be paid to producers of milk and cream for the Boston Area at a level which will give those products a purchasing power with respect to articles that producers buy equivalent to the purchasing power of those commodities during the base period fixed by the order.

8. The said Order No. — was approved and favored by more than — per cent. (—%) of the producers who, during the representative month of —, 19—, had been engaged in the production of milk for sale in the Boston Area.

9. The said Order No. — was continuously in effect from the effective date thereof until — —, 19—, when the Secretary pursuant to authority vested in him by the provisions of the act and the applicable general regulations thereunder, suspended the further operation of the said order. A copy of the order suspending the said Order No. — is attached hereto, marked "Exhibit C," and made a part hereof.

10. On — —, 19—, the Acting Secretary of Agriculture, pursuant to the authority vested in him by the provisions of the act and the applicable general regulations thereunder, terminated the said order of suspension, effective — —, 19—, relative to the following provisions of said Order No. —: Article I, Article II, Article III, Article IV, Article VI, section 1, Article XII, Article XIII, Article XIV, Article XV, Article XVI. A copy of the order terminating the order suspending the said Order No. — is attached hereto, marked "Exhibit D," and made a part hereof.

11. On — —, 19—, the Secretary of Agriculture, pursuant to sections 8c (3) and 8c (17) of the act, gave notice of a public hearing on a proposed amendment to Order No. —, and, in accordance with the terms of the said notice, the said public hearing on the proposed amendment to said Order No. — was held at —, —, on — —, 19—; at —, —, on — —, 19—, and at —, —, on — —, 19—, at which places and times all interested parties were afforded an opportunity to be heard on the proposed amendment. The said public hearing was attended by representatives of producers, handlers, and consumers of milk sold in the Boston Area.

12. Upon the evidence adduced at the said hearing, the Secretary made all the findings required by the applicable provisions of the act, and, in accordance with the provisions of section 8c (1), (2), (4), (9), and (17) of the act, issued an amendment to said Order No. —, effective — —, 19—. (The said Order No. — and the said amendment are hereinafter collectively referred to as the "Order as amended.") The said amendment contains terms and conditions authorized by the applicable provisions of the act and no others. A copy of said Order as amended, marked "Exhibit E," is attached hereto and made a part hereof.

13. The said amendment to Order No. — was favored and approved by more than — per cent. (—%) of the producers who, during the representative month of —, 19—, had been engaged in the production of milk for sale in the Boston Area and who voted at a referendum conducted by the Secretary pursuant to section 8c (19) of the act.

14. The Order as amended has been continuously in effect from the effective date thereof to and including the date of the filing of this bill of complaint.

15. During the year ending — —, 19—, approximately — per cent. (—%) of the milk and — per cent. (—%) of the cream used in the Boston Area was imported from other states. During the same period, — per cent. (—%) of all the milk brought into the Boston Area originated in —, — per cent. (—%) originated in —, — per cent. (—%) originated in —, — per cent. (—%) originated in —. Only — per cent. (—%) originated in —, of which less than — per cent. (—%) was handled by handlers dealing exclusively in milk produced in —. Cream was received in the Boston Area during 19— from — states. — supplied — per cent. (—%) of the total quantity; —, — per cent. (—%); New York, — per cent. (—%); only — per cent. (—%) originated in —.

16. The defendant — & Sons, Inc., is engaged in the business of receiving, buying, processing, selling, and distributing milk, and is a "handler" of milk as defined in section 8c (1) of the act and in paragraph 6 of section 1 of Article I of the Order as amended, and as such is subject to the applicable provisions of the act and of the Order as amended. The defendant — Milk Company is also engaged in the business of receiving, buying, processing, and selling milk and is a "handler" of milk as defined in section 8c (1) of the act and in paragraph 6 of section 1 of Article I of the Order as amended and as such is subject to the applicable provisions of the act and of the Order as amended.

17. The defendant — & Sons, Inc., purchases milk from producers located in the states of —, —, —, and —; the milk is transported in interstate commerce to the distributing plant of the defendant corporation in —, and there is processed and then distributed and sold by the said defendant in the Boston Area. The defendant corporation operates receiving stations at —, —, —, and —, all in the state of —; at —, —, and —, all in the state of —; at —, —, and —, all in the state of —; and at — and — in the state of —. The defendant corporation also purchases milk from producers located within the commonwealth of — and processes and distributes and sells the said milk in the Boston Area. In the delivery period — — to — —, 19—, the defendant corporation purchased milk from a total of — producers. Of this total, — delivered to plants located in the state of —; — to plants located in the state of —; — to plants located in the state of —; — to plants located in the state of —; and — to the plant in the commonwealth of —. From time to time the defendant corporation also purchases from other handlers, and distributes and sells in the Boston Area, milk which has been received by the said handlers from producers located outside the commonwealth of — and transported in interstate commerce into the Boston Area. In the delivery period — — to — —, 19—, the defendant handled — pounds of milk in the Boston Area.

The defendant — Milk Company purchases milk from producers located in the state of —; the milk is transported in interstate commerce

into the commonwealth of —, where it is sold to the defendant — & Sons, Inc. The said milk is then processed by the defendant — & Sons, Inc. and distributed and sold in the Boston Area. The defendant — Milk Company also purchases milk from producers located in the commonwealth of — and sells the said milk to the defendant — & Sons, Inc., which processes the said milk and distributes and sells it in the Boston Area. During the period — — to — —, 19—, the defendant — Milk Company handled — pounds of milk in the Boston Area.

18. Each of the defendant corporations has been, since the effective date of the Order as amended, and now is, a competitor of all other handlers of milk in the Boston Area, and all of the milk handled by each of the defendant corporations in the Boston Area since the effective date of the Order as amended, has been handled in competition with milk which is purchased outside the commonwealth of —, transported in interstate commerce to distributing plants within the said commonwealth, and then distributed and sold in the Boston Area. All of the handling of milk in the Boston Area by the defendant corporations is in the current of interstate commerce, as defined in section 10 (j) of the act, and directly burdens, obstructs, or affects interstate commerce in milk and its products.

19. Milk is an article of diet which is of great importance to public health, and it is imperative that a reliable and adequate supply of milk be maintained. The consumers in the Boston Area are completely dependent upon milk producers outside of — for a steady flow of milk. To assure a continuous reliable supply, milk producers shipping into the Boston Area, numbering approximately — must be paid fair and reasonable prices for their milk.

20. —, —, —, and — supply practically all of the milk marketed in the Boston Area. Milk production is a substantial source of farm cash income in —, —, —, and —. In 19— the cash farm income from milk sold from farms in — represented — per cent. (—%) of the total farm cash income; in —, — per cent. (—%); in —, — per cent. (—%); in —, — per cent. (—%).

21. From 19— to 19— the prices for wholesale milk received by producers in —, —, —, and — declined steadily and substantially. In 19—, when the said Order No. — was issued, the farm price for wholesale milk in — was — per cent. (—%) below the 19— level, in —, — per cent. (—%), in —, — per cent. (—%), and in —, — per cent. (—%).

22. In accordance with long established practice in the milk industry in the United States, including the Boston Area, the Order as amended classifies milk according to the use for which the milk is sold and fixes a price for each classification. All milk sold or distributed by handlers as whole milk, chocolate milk, or flavored milk is designated as Class I milk and bears a higher price than milk sold, distributed, or disposed of for other uses, the latter being designated as Class II milk. The Order as amended provides for payments to the producers of milk in substantially

the following manner: The aggregate value of all milk delivered to handlers for sale in the Boston Area is calculated on the use basis, that is on the basis of the Class I price for Class I milk and Class II price for Class II milk. The aggregate amount so calculated is distributed to producers on the basis of so-called "blended price," which represents a blend of the value of both classes of milk and accordingly is less than the Class I price but more than the Class II price. This blended price is paid uniformly to all producers subject to certain location differentials which are set forth in the Order as amended. The handlers are required to add to the blended price the market value of the amount of butterfat which it would be necessary to add to the milk to give it a butterfat content of — per cent. (—%). Under the Order the blended price is a minimum price and handlers are permitted to pay producers more than the blended price.

23. The result of the method of payment described in paragraph 22 above is that a handler with relatively large Class I sales by paying to his producers the blended price pays them a sum which is less than the total use value of the milk handled by him. To adjust the differences, paragraph 3 of section 1 of Article VIII of the Order as amended provides that the difference between the use value of the milk of each handler and the amount he pays to producers be paid to, or received from, the market administrator who acts as agent for this clearing arrangement. This clearing arrangement does not increase or decrease the cost of milk to any handler.

24. By the provisions of said paragraph 3 of section 1 of Article VIII of the Order as amended the defendant — & Sons, Inc., is now required and obligated to pay to the market administrator for the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing; and for the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing. The said defendant has failed and refused to pay the said amount of — dollars (\$—) and — dollars (\$—) and has violated and now is violating said paragraph 3 of section 1 of Article VIII of the Order as amended. The plaintiffs are informed and believe that the defendant — & Sons, Inc., unless enjoined, will continue to violate said paragraph 3 of section 1 of Article VIII by failing and refusing to make the payments to producers as required by the said paragraph 3 of section 1 of article VIII.

25. By the provisions of said paragraph 3 of section 1 of Article VIII of the Order as amended the defendant — Milk Company is required and obligated to pay to the market administrator for the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing, and for the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing. The said defendant has failed and refused to pay the said amounts of — dollars (\$—) and — dollars (\$—) and has violated and now is violating said paragraph 3 of section 1 of Article VIII of the

Order as amended. The plaintiffs are informed and believe that the said defendant — Milk Company, unless enjoined, will continue to violate said paragraph 3 of section 1 of Article VIII by failing and refusing to make the payments to producers as required by the said paragraph 3 of section 1 of Article VIII of the Order as amended.

26. Section 1 of Article X of the Order as amended requires each handler to pay to the market administrator on or before the — day after the end of each delivery period as his pro rata share of the expenses incurred in the administration of the Order as amended nor more than — cents (—c) per hundredweight on all milk which is delivered to him by producers or produced by him.

27. By the said provisions of section 1 of Article X of the Order as amended, the defendant — & Sons, Inc. is required and obligated to pay to the market administrator for the delivery period of — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing, and for the delivery period of — — to — —, 19—, the amount of — dollars (\$—) which said amount is now due and owing. The said defendant has failed and refused to pay the said amounts of — dollars (\$—) and — dollars (\$—) and has violated and now is violating said section 1 of Article X of the Order as amended. The plaintiffs are informed and believe that the said defendant unless enjoined will continue to violate said section 1 of Article X of the Order as amended, by failing and refusing to make the payments required by the said section.

28. By the said provisions of section 1 of Article X of the Order as amended the defendant — Milk Company is now required and obligated to pay the market administrator for the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing, and for the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing. The said defendant has failed and refused to pay the said amounts of — dollars (\$—) and — dollars (\$—) and has violated and is now violating said section 1 of Article X of the Order as amended. The plaintiffs are informed and believe that the said defendant, unless enjoined, will continue to violate said section 1 of Article X of the Order as amended by failing and refusing to make the payments required by the said section.

29. Section 1 of Article IX of the Order as amended provides that, except in the case of milk purchased from producers who are members of a cooperative association, each handler shall deduct not more than — cents (—c) per hundredweight from payments made direct to producers for all milk handled during each delivery period and shall pay the amount so deducted to the market administrator on or before the — day after the end of such marketing period, to be used by the said market administrator in supplying information and in rendering certain

valuable services to producers who are not members of a cooperative association.

30. In the delivery periods — — to — —, 19—, and — — to — —, 19—, the defendant — & Sons, Inc., purchased milk from producers who were not members of a cooperative association, and by the said provisions of section 1 of Article IX of the Order as amended the said defendant is now required and obligated to pay to the market administrator on account of the milk so purchased in the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing, and on account of milk so purchased in the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing. The defendant has failed and refused to pay the said amounts of — dollars (\$—) and — dollars (\$—) and has violated and now is violating said section 1 of Article IX of the Order as amended. The plaintiffs are informed and believe that the said defendant, unless enjoined, will continue to violate said section 1 of Article IX of the Order as amended, by failing and refusing to make the payments required by the said section.

31. During the delivery periods — — to — —, 19—, and — — to — —, 19—, the defendant — Milk Company purchased milk from producers who were not members of a cooperative association, and by the said provisions of section 1 of Article IX of the Order as amended the said defendant is required and obligated to pay to the market administrator on account of the milk so purchased in the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing, and on account of the milk so purchased in the delivery period — — to — —, 19—, the amount of — dollars (\$—), which said amount is now due and owing. The said defendant has failed and refused to pay the said amounts of — dollars (\$—) and — dollars (\$—) and has violated and now is violating section 1 of Article IX of the Order as amended. The plaintiffs are informed and believe that the said defendant, unless enjoined, will continue to violate said section 1 of Article IX of the Order as amended by failing and refusing to make the payments required by the said section.

32. The accomplishment of the purposes of the act and of the Order as amended depends upon the effective and orderly administration and enforcement of the Order as amended, and upon compliance with all of the provisions of the Order as amended by all of the handlers of milk subject to the provisions of the Order as amended. The refusal of the defendants to make the payments required by paragraph 3 of section 1 of Article VIII and section 1 of Article X and section 1 of Article IX of the Order as amended has made impossible the effective and orderly administration and enforcement of the Order as amended. Unless the defendants are immediately restrained from continuing to violate the Order as amended and are immediately compelled to comply with all of its provisions, other

handlers will be encouraged, or compelled by economic necessity, to refuse to comply with the provisions of the Order as amended, the prices received by producers for milk will be lowered, commerce in milk among the several states will be disrupted, burdened, and obstructed, the lawful regulation of such commerce as provided by congress in the act and the Order will be ineffective, the declared policy of congress will be defeated, and the plaintiffs will suffer irreparable injury.

Wherefore, plaintiffs pray:

1. That the court issue a preliminary injunction preventing and restraining the defendant corporations, their agents, officers, attorneys, employees, successors, and assigns from violating any of the provisions of Order No. — as amended, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area during the pendency of this suit.

2. That the court issue a preliminary injunction commanding each of the defendant corporations to pay all amounts now due and owing by it under the provisions of Order No. — as amended, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area and commanding each of the defendant corporations, its agents, officers, attorneys, employees, successors, and assigns to comply with all of the provisions of said Order No. — as amended during the pendency of this action.

3. That the court issue a permanent injunction preventing and restraining the defendant corporations, their agents, officers, attorneys, employees, successors, and assigns from violating the provisions of Order No. — as amended, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area.

4. That the court issue a permanent injunction commanding the defendant corporations, their agents, officers, attorneys, employees, successors, and assigns, to comply with all provisions of Order No. — as amended, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area.

5. That the plaintiffs be given all other, further, and different relief as to this court may seem just and proper.

United States attorney.

Source of Form.

Adapted from record in Hood v. United States, 307 U. S. 588, 83 L. ed. 1478, 59 Sup. Ct. 1019.

Statutory References.

Jurisdiction of courts, 2 F. C. A., Title 7, § 608 (a) (6); U. S. C. A., Title 7, § 608 (a) (6); id. U. S. C.

Regulation of sale of milk, 2 F. C. A., Title 7, § 608 (c); U. S. C. A., Title 7, § 608 (c); id. U. S. C.

1016. Complaint to Enjoin Enforcement of Orders of Secretary of Agriculture (Cotton Quota).

District Court of the United States

_____ District of _____

_____ Division

_____,

Plaintiff,

v.

_____ Farmers Gin Company, Inc.,

_____ Gin Company,

_____, _____,

_____.

Defendants.

Civil Action

No. —

1. This action arises under an Act of Congress, to wit, the Agricultural Adjustment Act of 1938.

II. Plaintiff resides in _____ County, _____. _____ Farmers Gin Company, Inc., is a corporation duly incorporated and existing under and by virtue of the laws of the state of _____ with its principal office and place of business in _____, _____ County, _____. _____ Gin Company is a corporation duly incorporated and existing under and by virtue of the laws of the state of _____ and owns and operates a gin at _____ in _____ County _____, under the name of _____ Growers Gin Company. _____, _____, and _____ each reside in _____ County, _____, and constitute the County Committee of _____ County, _____, charged with the administration of the Agricultural Adjustment Act of 1938 in _____ County, insofar as the cotton marketing quota provisions under Part IV of said act are concerned. Both plaintiff and defendants reside in the _____ District of _____, _____ Division.

III. Plaintiff is a farmer and during the crop year of 1938 and many years prior thereto was engaged in the planting, cultivation, harvesting, and local sale of cotton which during all of said period of time constituted his chief money crop. During the crop year of 1938 plaintiff rented approximately _____ acres of land situated in _____ County peculiarly suited and adapted to the production of cotton and prepared _____ acres thereof to be planted for cotton, expending considerable time, labor, and money in the preparation thereof and also, thereafter, on the planting, chopping, and cultivation of said crop and began planting said land with cotton on or about the _____ day of _____, 1938, and all of said cotton was planted and said crops growing on all of said land prior to the _____ day of _____, 1938.

IV. On _____, 19____, the Agricultural Adjustment Act of 1938 was approved, and thereafter the Honorable _____, Secretary of Agriculture of the United States (hereinafter referred to as "Secretary"), pursuant to the provisions of Part IV of said act found and determined that the total supply of cotton for the marketing year of 1938 exceeded by more than _____ per cent. (____%) the normal supply thereof and published and

declared such facts and findings, determined the national allotment of cotton, and, pursuant thereto, the marketing quotas provided for cotton by Part IV of the Agricultural Adjustment Act of 1938 became effective during such marketing year of 1938.

After the findings and proclamation made, as aforesaid, by the Secretary, the state allotment of Texas was determined by him, pursuant to Article 344 (c) (1), and the acreage allotment of — County, —, was likewise determined, pursuant to the provisions of said act and was apportioned among the various farmers in — County by the Secretary, acting by and through the local committee, pursuant to the provisions of section 344, section (d) and plaintiff's farm acreage allotment on the above-mentioned lands upon which he could plant and produce cotton was fixed and determined as — acres, and he was informed of such fact on or about the — day of —, 1938, and had no knowledge whatsoever as to the amount thereof prior to the receipt of such notice. The farm marketing quota on said — acres so allotted to him as provided for by section 346, section (a) of such act was thereafter determined and fixed by the county committee and plaintiff was advised of such fact on or about the — day of —, 1938, and had no knowledge of the amount thereof prior to the receipt of such notice.

The referendum provided for by section 347 of said act was held on — —, 1938, at a time when neither the acreage allotment of — County, the farm acreage allotments and the farm marketing quotas of farmers in — County, including plaintiff, had been determined, and were not known, and when those participating in said referendum could not possibly know the amount of such allotments or quotas. After such referendum the Secretary announced that the result thereof favored such quotas and that less than — of the farmers voting in such referendum were opposed thereto.

V. Plaintiff cultivated and cared for the cotton so planted by him on the above-mentioned — acres of land, expending a large amount of time and money thereon and began to pick the same about — —, 1938, and completed the harvesting of all of said cotton planted on said — acres about — —, 1938. Said cotton was picked under contract with various Mexican cotton pickers whereby they picked and delivered the same to the gins to be designated by plaintiff upon vehicles owned or operated by them in — and — Counties, —, and pursuant to the instructions of plaintiff, part of the cotton so picked from the above-mentioned land was delivered to — Farmers Gin Company, Inc., at —, —, and the balance to the — Growers Gin Company, Inc., operated by — Gin Company, at —, —. The delivery of said cotton to said gins was for the purpose of ginning and upon delivery thereof said cotton was immediately ginned and the lint cotton compressed into standard bales weighing approximately — pounds each. After said cotton was so ginned and baled, said bales were placed in the — of each of said defendant gins, subject to the disposition to be made thereof

by plaintiff and from time to time during the picking period, aforesaid, said bales of cotton so grown by him on the above-mentioned land, were sold by plaintiff to said defendant gins, residents of — and — Counties, respectively, for various prices.

Such sales were made to defendant gins wholly within — County or — County, —, respectively, and all such transactions herein mentioned were wholly completed by plaintiff, and between plaintiff and said defendant gins in — or — Counties in the state of —, that in the purchase of said cotton from plaintiff said defendant gins were acting only and solely in their own behalf and not in any manner for any person or concern beyond the state of —, and at the time of such sales plaintiff did not know whether said defendant gins would sell or ship said cotton to a consignee or buyer within or without the state of —, and has no knowledge or information at this time as to what disposition was in fact made of such cotton by said defendant gins or whether the same has been or ever will be transported beyond the boundaries of the state of —.

In growing and selling said cotton, as aforesaid, plaintiff was not acting or engaging in interstate commerce in any manner whatsoever and the production and sale of said cotton was not itself in any manner interstate commerce.

VI. Plaintiff produced, picked, and sold to the defendant gins from the — acres of land hereinabove mentioned, — pounds of lint cotton in excess of his farm marketing quota on said land, selling and delivering — pounds of such cotton to — Farmers Gin Company, Inc., and — pounds to — Gin Company at their — Growers Gin. Out of the amount due plaintiff upon the sale of said excess cotton sold as aforesaid, — Farmers Gin Company, Inc., retained the sum of — cents (—c) per pound as penalty, amounting to the sum of — dollars (\$—), and — Gin Company retained as a penalty — cents (—c) per pound on the excess cotton sold by plaintiff to it, amounting to the sum of — dollars (\$—), and in retaining said respective amounts said defendants claimed to be acting pursuant to section 348 of said Agricultural Adjustment Act of 1938, and still have and retain said sums of money in their possession and although plaintiff has demanded said respective sums of money from each of said defendants they have each failed and refused and still fail and refuse to pay or deliver said sums or any part thereof to plaintiff.

VII. Defendants —, —, and — are attempting to collect from the defendant gins the penalties held and retained by them as hereinabove alleged and will in the future attempt, unless restrained and enjoined by this court, to limit under the provisions of Part IV of the Agricultural Adjustment Act of 1938, the number of acres of cotton which he can plant in his business and likewise limit the amount of such cotton which he can sell in local commerce in — and — Counties in the state of —, and penalize and collect from him a penalty of — cents (—c) per pound upon all cotton sold in excess of the amount which they and

the Secretary of Agriculture may determine he can raise upon the land so allotted to him.

VIII. The actions complained of herein on the part of the defendants and the actions which —, —, and — will in the future take under and pursuant to Part IV of said Agricultural Adjustment Act of 1938 are without warrant or foundation in law because Part IV of the Agricultural Adjustment Act of 1938 relating to marketing quotas of cotton is invalid and not binding upon plaintiff and is unconstitutional in that:

(a) It is an attempt by congress to regulate the local production and sale of cotton within the boundaries of the state of — under the guise of an exercise of the power conferred on congress by section VIII, clause 3 of the Constitution of the United States and it is beyond the power of congress to regulate same and is an invasion of the power expressly reserved in the states under the provisions of the Tenth Amendment to such Constitution;

(b) It is an unlawful delegation of legislative authority by congress to the Secretary of Agriculture of the United States contrary to the provisions of Article I, section 1 of the Constitution, the imposition of farm marketing quotas together with the advisability and necessity therefor being left to the arbitrary and uncontrolled judgment and discretion of the Secretary by virtue of section 345 of said act and sections (10) (a), (11) (b), and (12) of section 301 of said act, and the determination of and adjustment for current trends in a normal year's domestic consumption or a normal year's exports is vested in the Secretary;

(c) Section 347 of said act is contrary to the above-mentioned Article I, section 1, of the Constitution in that it constitutes an unlawful delegation of legislative power by congress to the cotton farmers specified therein, vesting in one-third of said farmers the power and authority to repeal or suspend the operation of such law and the imposition of farm marketing quotas thereunder;

(d) Said act is contrary to the Fifth Amendment to the Constitution because section 348 thereof deprives plaintiff of his right to produce, sell, and dispose of his cotton in local commerce in the state of —, thus depriving plaintiff of his property without due process of law and constitutes a taking of the same for public use without any compensation whatsoever.

Plaintiff prays judgment against the defendant — Farmers Gin Company in the sum of — dollars (\$—), together with all costs, and that the defendant —, —, and — be restrained and enjoined from collecting or attempting to collect said penalties from him, and a declaratory judgment adjudicating said Part IV of the Agricultural Adjustment Act of 1938, and the separate paragraphs thereof hereinabove complained of void and unconstitutional upon the grounds hereinabove set forth.

Attorneys for plaintiff.

Source of Form.

Adapted from record in *Troppy v. La-Sara Farmers Gin Co.* (D. C.-Tex.), 28 Fed. Supp. 830.

Statutory Reference.

Marketing quotas and penalties for violation thereof, 2 F. C. A., Title 7, §§ 1341 to 1348; U. S. C. A., Title 7, §§ 1341 to 1348; id. U. S. C.

1017. Answer in Action to Enjoin Order of Secretary of Agriculture.

(Cotton Quota.)

(Caption.)

ANSWER OF DEFENDANTS _____, _____, AND _____

The answer of the defendants —, —, and — to the complaint heretofore filed in this case respectfully shows:

The allegations in paragraphs one, two, and four, and, except as herein-after stated, also of paragraph three, are admitted. The allegations of paragraphs seven and eight are denied. There is also denied the allegation of the last subparagraph of paragraph five to the effect that the sale by the plaintiff of cotton was not a transaction in or affecting interstate and foreign commerce. These defendants are without knowledge or information sufficient to form a belief as to the truth of, first, the allegations contained in paragraph three to the effect that the plaintiff was for many years prior to the year 1938 engaged in the planting, cultivating, and harvesting and local sale of cotton, that during all of such period of time the growing of cotton constituted the chief money crop of the plaintiff, and that during the crop year of 1938 the plaintiff rented approximately — acres of land situated in — County, —, peculiarly situated and adapted to the production of cotton; second, the allegations of paragraph five, except the allegation to the effect that the cotton of the plaintiff was sold to the ginners mentioned therein after ginning by them, which latter allegation is admitted; and third, the allegation of paragraph six in respect to the exact quantity of cotton sold to each of the ginners named therein or as to the exact amount of the money retained by said ginners, but it is admitted that the plaintiff sold to said ginners at least the quantity of cotton mentioned in said paragraph and that the ginners retained amounts at least as much as stated therein.

FIRST DEFENSE

These defendants aver, in connection with paragraph seven of the complaint, that they have no power or authority either as individuals or as constituting a county committee, as provided for in the Agricultural Adjustment Act of 1938, to enforce the terms and provisions of said act or to require the plaintiff to do, or refrain from doing, any of the acts mentioned in said paragraph, or anything whatsoever.

SECOND DEFENSE

The — provisions of the Agricultural Adjustment Act of 1938 whereby farm marketing quotas for cotton were established by the Secretary of Agriculture, through local committees, for cotton farms, including the farm of the plaintiff, constitute a regulation of the marketing of abnormally excessive supplies of cotton as in and directly affecting interstate and foreign commerce, and the provisions of the act drawn in question in this case are in every respect consistent with the Constitution of the United States.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

United States attorney.

United States Courthouse, —, —.

Special Assistant to the Attorney-General,
Department of Justice, —, Attorneys for
defendants —, —, and —.

Source of Form.

Adapted from record in *Troppey v. La-Sara Farmers Gin Co.* (D. C.-Tex.), 28 Fed. Supp. 830.

Statutory Reference.

Marketing quotas and penalties for violation thereof, 2 F. C. A., Title 7, §§ 1341 to 1348; U. S. C. A., Title 7, §§ 1341 to 1348; id. U. S. C.

1018. Motion by United States for Leave to Intervene.

(Caption.)

The United States of America by its attorneys, moves for leave to intervene and become a party defendant in the above-entitled case for the purpose of presenting evidence and argument upon the question of the constitutionality of the Agricultural Adjustment Act of 1938, approved February 16, 1938 (52 Stat. 31) as amended (hereinafter referred to as to the "Act"), on the following grounds:

1. The plaintiff, in his complaint filed herein describes himself as a farmer engaged in the planting, cultivating, and harvesting, and sale of cotton. The defendants as to whom the complaint has not been dismissed are described in the complaint as corporations doing business in — and — Counties, —, engaged in the ginning, buying, and selling of cotton. The object of the complaint is to recover from said defendants certain sums of money retained by said defendants respectively, out of the purchase-price of cotton sold by the plaintiff to said defendants and withheld

from the plaintiff by the said defendants for the purpose of paying the same to the Secretary of Agriculture of the United States in accordance with the requirements of Title III, subtitle B, of Part IV of the Act, and particularly sections 345, 346, 348 and 372 thereof.

2. Plaintiff alleges as grounds for the relief sought by him in said complaint that the applicable provisions of the Act are violative of and repugnant to the Constitution of the United States. It is particularly alleged that such provisions of the Act constitute an invalid exercise of the commerce power of congress under Article I, section 8, clause 3, of the Constitution of the United States, and invade the powers reserved to the states under the Tenth Amendment thereto; that such provisions of the Act constitute an unlawful delegation of legislative power to the Secretary of Agriculture of the United States; and that by such provisions the plaintiff and others similarly situated are deprived of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

3. In accordance with the order of this court entered herein the — day of —, 1939, with the consent of all parties, the said defendants, — Farmers Gin Company, Inc., and — Gin Company, have deposited in the registry of this court — dollars (\$—) and — dollars (\$—), respectively, the disposition thereof to abide final decision of this case, said sums representing the monies sought to be recovered herein by the plaintiff.

4. The clerk of this court, under date of — —, 1938, acting pursuant to an order of this court dated — —, 1938, notified the attorney-general of the United States of the pendency of this action and transmitted to the attorney-general, by mail, a copy of the said complaint.

There is presented herein a case within the meaning of section 1 of the Act of August 24, 1937, ch. 754, 50 Stat. 751, U. S. C., Title 28, § 401.

Accompanying this motion is the answer of the United States of America to the said complaint, in which answer is set forth the defense for which intervention is sought.

United States attorney.

Assistant United States attorney,
United States Courthouse, —, —.

Special Assistant to the attorney-general,
Department of Justice, Washington, D. C.

The plaintiff and the defendants, by their attorneys, respectively, hereby waive notice of the foregoing motion and acknowledge service of a copy thereof and a copy of the answer of the United States of America referred

to therein, and consent to an order permitting the intervention of the United States of America and the filing of the said answer herein.

By _____
Attorney for plaintiff.

Attorney for defendant,
—— Farmers Gin Company, Inc.

Attorney for defendant,
—— Gin Company.

Source of Form.

Adapted from record in *Troppy v. La-Sara Farmers Gin Co.* (D. C.-Tex.), 28 Fed. Supp. 830.

Statutory Reference.

Marketing quotas and penalties for violation thereof, 2 F. C. A., Title 7, §§ 1341 to 1348; U. S. C. A., Title 7, §§ 1341 to 1348; id. U. S. C.

1019. Order Granting Leave to Intervene.

(Caption.)

ORDER OF COURT PERMITTING INTERVENTION OF THE UNITED STATES
OF AMERICA AS A PARTY DEFENDANT

The foregoing motion is granted and the United States of America is hereby permitted to intervene as a party defendant in the above-entitled cause and to file its answer accompanying said motion for the purposes, and subject to the provisions, of section 1 of the Act of August 24, 1937, ch. 754, 50 Stat. 751, U. S. C., Title 28, § 401.

District judge.

Source of Form.

Taken from record in *Troppy v. La-Sara Farmers Gin Co.* (D. C.-Tex.), 28 Fed. Supp. 830.

Statutory Reference.

Marketing quotas, 2 F. C. A., Title 7, §§ 1341 to 1348; U. S. C. A., Title 7, §§ 1341 to 1348; id. U. S. C.

1020. Answer of United States as Intervening Defendant.

(Caption.)

The answer of the United States of America, intervening defendant herein respectfully shows:

The allegations of paragraphs 1, 2, and 3, and, except as hereinafter stated, the allegations of paragraph 4, are admitted. The allegation of paragraph 4 to the effect that "Plaintiff's farm acreage allotment on the above-mentioned land upon which he could plant and produce cotton, was

fixed and determined as 144 acres" is denied. It is averred, however, that under the Agricultural Adjustment Act of 1938 there were established for the several farms operated by the plaintiff, in — County, —, cotton acreage allotments aggregating — acres; and further, that farm marketing quotas for said farms were computed upon the basis of — acres and not on the basis of — acres as alleged in said paragraph.

The allegations of paragraph 5 are admitted with the exception of the allegation of the last subparagraph thereof to the effect that the sale by the plaintiff of cotton was not a transaction in and affecting interstate and foreign commerce, which allegation is denied.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph 6 in respect to the exact quantity of cotton sold by the plaintiff to each of the ginnermen named therein, or as to the exact amount of money retained by said ginnermen, but it is admitted that the plaintiff sold to the said ginnermen at least the quantity of cotton mentioned in said paragraph and that the ginnermen retained amounts at least as much as stated therein.

The allegations of paragraphs 7 and 8 are denied.

FIRST DEFENSE

This defendant avers that the applicable provisions of the Agricultural Adjustment Act of 1938 whereby farm marketing quotas for cotton were established by the Secretary of Agriculture through local committees for cotton farms, including farms operated by the plaintiff, constitute a regulation of the marketing of abnormally excessive supplies of cotton as in and directly affecting interstate and foreign commerce, and that the provisions of said act drawn in question by the plaintiff in this case are in every respect consistent with the Constitution of the United States of America.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

United States attorney.

Assistant United States attorney,
United States Courthouse, —, —.

Source of Form.

Taken from record in *Troppy v. La-Sara Farmers Gin Co.* (D. C.-Tex.), 28 Fed. Supp. 830.

Statutory Reference.

Marketing quotas, 2 F. C. A., Title 7, §§ 1341 to 1348; U. S. C. A., Title 7, §§ 1341 to 1348; id. U. S. C.

FEDERAL COURT RULES

RULES OF THE SUPREME COURT OF THE UNITED STATES

Revised Rules Adopted February 13, 1939. Effective February 27, 1939.

Rule

1. Clerk.
2. Attorneys and counsellors.
3. Clerks to justices not to practice.
4. Library.
5. Original actions.
6. Process.
7. Motions, including those to dismiss or affirm; summary docket; motion day.
8. Bills of exception; charge to jury; omission of unnecessary evidence.
9. Assignment of errors.
10. Appeal; citation; record; designation of parts to be included in transcript.
11. Docketing cases.
12. Jurisdictional statements.
13. Printing records; designation of points intended to be relied upon and of parts of record to be printed.
14. Translations.
15. Further proof.
16. Objections to evidence in record.
17. Certiorari to correct diminution of record.
18. Models, diagrams, and exhibits of material.
19. Death of party; revivor; substitution.
20. Call and order of the docket; motions to advance.
21. No appearance of appellant or petitioner.
22. No appearance of appellee or respondent.
23. No appearance of either party.
24. Neither party ready at second term.
25. Submission on briefs by one or both parties without oral argument.
26. Form of printed records, petitions, briefs, etc.
27. Briefs.
28. Oral argument.

Rule

29. Opinions of the court.
30. Interest and damages.
31. Procedendo to issue on dismissal.
32. Costs.
33. Rehearing.
34. Mandates.
35. Dismissing cases in vacation.
36. Appeals; by whom allowed; supersedeas.
37. Questions certified by a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia.
38. Review on writ of certiorari of decisions of State Courts, Circuit Courts of Appeals, and the United States Court of Appeals for the District of Columbia.
39. Certiorari to a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia before judgment.
40. Questions certified by the Court of Claims.
41. Judgments of the Court of Claims; petitions for review on certiorari.
42. Judgments of Court of Customs and Patent Appeals or of Supreme Court of Philippine Islands; petitions for review on certiorari.
43. Order granting certiorari.
44. Rules, costs, fees, and interest on certiorari.
45. Custody of prisoners pending review of proceedings in habeas corpus.
46. Review on appeal.
47. Appeals under Act of August 24, 1937.
48. Joint or several appeals or petitions for writs of certiorari; summons and severance abolished.
49. No session on Saturday.
50. Adjournment of term.
51. Abrogation of prior rules.

Rule 1. Clerk.—1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counselor in any court, while he continues in office.

2. The clerk shall not permit any original record or paper to be taken from the office without an order from the court or one of the justices, except as provided by Rule 13, paragraph 4.

Rule 2. Attorneys and counselors.—1. It shall be requisite to the admission of attorneys or counselors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, or Insular Possession, and that their private and professional characters shall appear to be good.

2. Not less than two weeks in advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, (2) his personal statement under oath setting out the date and place of his birth, the names of his parents, his place of residence and office address, the courts of last resort to which he has been admitted, the places where he has been a practitioner, and, if he is not a native-born citizen, the date and place of his naturalization, and information respecting any reprimand of any court pertaining to his conduct or fitness as a member of the bar, and (3) two letters or signed statements of members of the bar of this court, not related to the applicant, who are resident practitioners within the State, Territory, District, or Insular Possession (to which the application refers as provided in paragraph 1 of this rule) stating that the applicant is personally known to them, that he possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement and that they affirm that his personal and professional character and standing are good.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he has examined the credentials of the applicant filed in the office of the clerk in accordance with the foregoing requirement and that he is satisfied that the applicant possesses the necessary qualifications. (Paragraphs 1, 2 and 3 of Rule 2, as amended Dec. 7, 1936, effective Feb. 1, 1937.)

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

I, ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

5. Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred. (As amended May 31, 1932, effective September 1, 1932.)

Rule 3. Clerks to justices not to practice.—No one serving as a law clerk or secretary to a member of this court shall practice as an attorney or counsellor in any court while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court, or permit his name to appear on a brief filed in this court, until two years shall have elapsed after such separation.

Rule 4. Library.—1. The library for the bar shall be open to members of the bar of this court; to members of Congress and to law officers of the executive or other departments of the Government, but books may not be removed from the building.

2. The library shall be open during such times as the reasonable needs of the bar require and be governed by such regulations as the librarian, with the approval of the court, may make effective.

Rule 5. Original actions.—Cases on the original docket shall be governed, as far as may be, by the rules applicable to cases on the appellate docket.

The initial pleading in any such action may be accompanied by a brief and shall be prefaced by a motion for leave to file, which motion will be presented to the court by the clerk on the first motion day following its lodgment in the clerk's office. If leave to file is granted the case will be placed on the original docket and the parties shall make such cash deposit with the clerk for the payment of his fees as he may require.

Additional pleadings shall be filed as the court directs.

Rule 6. Process.—1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney general, of such state.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of such process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed ex parte.

Rule 7. Motions, including those to dismiss or affirm; summary docket; motion day.—1. Every motion to the court shall be printed, and shall state clearly its object and the facts on which it is based.

2. Oral argument will not be heard on any motion unless the court specially assigns it therefor, when not exceeding one-half hour on each side will be allowed.

3. No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

A motion by appellee to dismiss an appeal will be received in advance of the court's ruling upon the jurisdictional statements only when presented in the manner provided by Rule 12, paragraph 3. When such a motion is made, the appellant shall have 20 days after service upon him within which to file in this court forty printed copies of a brief opposing the motion, except that where his counsel resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, the time shall be twenty-five days.

A motion by respondent to dismiss a writ of certiorari or by appellee to dismiss an appeal, after the court has ruled upon the jurisdictional statements and accompanying motions, if any (Rule 12, paragraph 5), will be received if not based upon grounds already advanced in opposition to the granting of the writ of certiorari or to the noting of jurisdiction of the appeal. Such motions, together with motions to dismiss certificates in case of questions certified, must be printed and forty copies thereof must be filed with the clerk, accompanied by proof that a copy of the motion, and accompanying brief, if any, have been served upon counsel of record for the opposing party. The opposing party shall have twenty days from the date of such service within which to file a printed brief opposing the motion. When counsel for the opposing party resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, the time shall be twenty-five days. Upon the filing of the opposing brief, or the expiration of the time allowed therefor, or express waiver of the right to file, the motion and briefs thereon shall be distributed by the clerk to the court for its consideration.

The pendency of a motion to dismiss or affirm shall not preclude the placing of the cause upon the calendar of the court for oral argument or its being called for argument when reached.

4. The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the question on which the decision of the cause depends are so unsubstantial as not to need further argument. The procedure provided in paragraph 3 of this rule for motions to dismiss shall

apply to and control motions to affirm. A motion to affirm may be united in the alternative with a motion to dismiss.

5. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to the summary docket. The hearing of causes on such docket will be expedited from time to time as the regular order of business may permit. A cause may be transferred to the summary docket on application, or on the court's own motion.

6. Monday of each week, when the court is in session, shall be motion day; and motions specially assigned for oral argument shall be entitled to preference over other cases. (As amended May 31, 1932.)

Rule 8. Bills of exception; charge to jury; omission of unnecessary evidence.—The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein may be set forth in full or in condensed and narrative form.

Rule 9. Assignment of errors.—Where an appeal is taken to this court from any court, the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition.

Rule 10. Appeal; citation; record; designation of parts to be included in transcript.—1. When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming and Montana, when the time shall be sixty days. The citation must be served before the return day.

2. The clerk of the court from which an appeal to this court may be allowed, shall make and transmit to this court under his hand and the seal of the court a true copy of the material parts of the record, always including the assignment of errors, and any opinions delivered in the case. The papers comprising the transcript shall be fastened together in one or more volumes of convenient size, paged consecutively and indexed.

To enable the clerk to perform such duty and for the purpose of reducing the size of transcripts and eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant, or his counsel, to file with the clerk of the lower court, promptly after an appeal is taken, together with proof or acknowledgment of service of a copy on the appellee, or his counsel, a praecipe indicating the portions of the record to be incorporated into the transcript. Within ten days thereafter (unless the time be enlarged by a judge of the lower court or a justice of this court), any other party to the appeal may serve and file a designation of additional portions of the record desired to be included. Sections (c), (e), and (h) of Rule 75 and Rule 76 of the Rules of Civil Procedure are incorporated herein by reference and are made applicable to an appeal to this court from a federal district court.

The clerk of the lower court shall transmit to this court as the transcript of the record only the portions of the record covered by such designations.

The parties or their counsel may by written stipulation filed with the clerk of the lower court indicate the portions of the record to be included in the transcript,

and the clerk shall then transmit only the parts designated in such stipulation.

In all cases the clerk shall include in the transcript all papers filed under authority of Rule 12.

If this court shall find that any portion of the record unnecessary to a proper presentation of the case has been incorporated into the transcript at the instance of either party, the whole or any part of the cost of printing and the clerk's fee for supervising the printing may be ordered to be paid by the offending party.

3. No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken that original papers of any kind should be inspected in this court, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers along with the usual transcript.

5. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in this court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, findings of fact and conclusions of law thereon, opinions of the court, final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper determination of such questions.

Rule 11. Docketing cases.—1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court.

2. But the appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument.

3. Upon the filing of the record brought up by appeal, the appearance of the counsel for the party docketing the case shall be entered.

Rule 12. Jurisdictional statements.—1. Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question. The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction, (b) to the statute of the state, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute or treaty may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; and (c) to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented.

The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain the jurisdiction.

If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved are substantial (*Zucht v. King*, 260 U. S. 174, 176, 177); specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner

in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari.

The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree.

If the appeal is from an interlocutory decree of a specially constituted district court of the United States, the statement must also include a showing of the matters in which it is claimed that the court has abused its discretion in granting or denying the interlocutory injunction. (*Alabama v. United States*, 279 U. S. 229.)

2. If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorporated by him in the transcript of record prepared for this court upon the appeal.

3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3.

4. The clerk of the court possessed of the record shall include the statements and motions, required and permitted to be filed under the provisions of this rule, in the transcript of record prepared for the use of this court on the appeal, anything in the praecipes or stipulations of the parties (Rule 10, par. 2) to the contrary notwithstanding.

5. After the case shall have been docketed in this court by the appellant, and the transcript of record filed (Rule 11, par. 1), the clerk of this court shall forthwith print the appellant's statement required by paragraph 1 of this rule and the opposing statement, and motions, if any, permitted by paragraph 3 of this rule, and the clerk shall thereupon distribute such printed papers to the court for its consideration.

At the time of docketing the case the appellant shall make such cash deposit with the clerk, in addition to such deposit as may be required under Rule 13, paragraph 1, as shall be necessary to defray the cost of printing 40 copies of his statement filed pursuant to paragraph 1 of this rule; and the appellee, upon demand, shall forthwith deposit with the clerk a sum sufficient to cover the cost of printing 40 copies of any statement or motions filed under paragraph 3 of this rule.

6. If either appellant or appellee fails to comply with the provisions of this rule, the clerk of this court shall report such failure to the court immediately so that this court may take such action as it deems proper.

Rule 13. Printing records; designation of points intended to be relied upon and of parts of record to be printed.—1. In all cases the appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor (see par. 9 of this rule), the clerk shall

make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the printing, and other probable fees, and shall furnish the same to the party docketing the case. If such estimated sum be not paid on or before a date designated by the clerk of this court in each case, it shall be the duty of the clerk to report that fact to the court, whereupon the cause will be dismissed, unless good cause to the contrary is shown.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be delivered by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 10, paragraph 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties. He shall also deposit in the law library of Congress to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions and briefs therein.

6. If the actual cost of printing the record, together with the fees of the clerk, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fees shall exceed the estimate, the excess shall be paid to the clerk within forty days after notice thereof, and if it be not paid the matter shall be dealt with as if it were a default under paragraph 2 of this rule, as well as by rendering a judgment against the defaulting party for such excess.

7. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fees shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of a party or his surety, of having served on such party or surety a copy of the bill of fees due by him in this court, and showing that payment has not been made, an attachment shall issue against such party or surety to compel payment of such fees.

9. When the record is filed, or within fifteen days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and a designation of the parts of the record which he thinks necessary for the consideration thereof or a designation of those parts considered unnecessary, whichever is more convenient, with proof of service of the same on the adverse party. The adverse party, within ten days after service of the statement and designation required to be filed by appellant may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the appellant. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The statement of points intended to be relied upon and the designations of the parts of the record to be printed shall be printed by the clerk with the record. He shall, however, omit all duplication, all repetition of titles and all other obviously unimportant matter, and make proper note thereof. The court will consider nothing but the points of law so stated. If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If either party shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 32, paragraph 6, shall be computed on the folios in the record as filed, and shall be in full for the performance of his duties in that regard.

Rule 14. Translations.—Whenever any record transmitted to this court upon appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or

other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and printed with the record.

Rule 15. Further proof.—1. In all cases where further proof is ordered by this court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, requiring him to file cross-interrogatories within twenty days from the service of such notice.

Rule 16. Objections to evidence in record.—In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent.

Rule 17. Certiorari to correct diminution of record.—No certiorari to correct diminution of the record will be awarded in any case, unless a printed motion therefor shall be made, and the facts on which the same is founded shall be shown, if not admitted by the other party, by affidavit. All such motions must be made not later than the first motion day after the expiration of sixty days from the printing of the record, unless for special cause shown the court receives the motion at a later time.

Rule 18. Models, diagrams, and exhibits of material.—1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the marshal at least one week before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material, placed in the custody of the marshal must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the marshal to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the marshal shall destroy them, or make such other disposition of them as to him may seem best.

Rule 19. Death of party; revivor; substitution.—1. Whenever, pending an appeal or writ of certiorari in this court, either party shall die, the proper representative in the personalty or realty of the deceased, according to the nature of the case, may voluntarily come in and be admitted as a party to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such order, if appellee or respondent, shall be entitled to have the appeal or writ of certiorari dismissed; and if the party so moving be appellant or petitioner he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, District or Insular Possession, in which the case originated for three successive weeks, at least sixty days before the expiration of the time designated for the representative of the deceased party to appear.

2. When the death of a party is suggested, and the representative of the deceased does not appear by the second day of the term next succeeding the suggestion,

and no measures are taken by the opposite party within that time to compel their [his] appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute an appeal or writ of certiorari to this court from any final judgment or decree, rendered in that court, and at the time of applying for such appeal or writ of certiorari the other party to the suit shall be dead and have no proper representative within the jurisdiction of that court, so that the suit can not be revived in that court, but shall have a proper representative in some State, Territory or District of the United States, the party desiring such appeal or writ of certiorari may procure the same, if otherwise entitled thereto, and may have proceedings on such judgment or decree superseded or stayed in the manner allowed by law and shall thereupon proceed with such appeal or writ of certiorari as in other cases. And within thirty days after the time when such appeal or writ of certiorari is returnable, or if the court be not then in session within ten days after it next convenes, the appellant or petitioner shall make a suggestion to the court, supported by affidavit, that such party was dead when the appeal or writ of certiorari was allowed, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that such deceased party had a proper representative in some State, Territory, or District of the United States—giving the name and character of such representative, and his place of residence; and, upon such suggestion and a motion therefor, an order may be obtained that, unless such representative shall make himself a party within a designated time the appellant or petitioner shall be entitled to open the record, and, on hearing have the judgment or decree reversed, if the same be erroneous: Provided, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the expiration of the time designated: And provided, also, That in every such case if the representative of the deceased party does not appear by the second day of the term next succeeding said suggestion, and the measures above provided to compel his appearance have not been taken as above required, by the opposite party, the case shall abate: And provided, also, That the representative may at any time before or after the suggestion, but before such abatement, come in and be made a party and thereupon the case shall be heard and determined as in other cases.

4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while a suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office.

(a) When the court is in vacation the motion papers may be filed with the clerk but must be presented to the court promptly after it reconvenes.

Rule 20. Call and order of the docket; motions to advance.—1. Unless it otherwise orders, the court, on the second Monday of each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as herein-after provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed with the argument, the case shall be continued to the next term or otherwise dealt with as provided in these rules.

2. Ten cases only shall be subject to call on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons supporting the motion.

4. Criminal cases may be advanced by leave of the court on motion of either party.

5. Cases once adjudicated by this court upon the merits, and again brought up, may be advanced by leave of the court.

6. Revenue and other cases in which the United States is concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may be advanced by leave of the court on motion of the Attorney General.

7. Other cases may be advanced for special cause shown. When a case is advanced, under this or any other paragraph, it will be subject to hearing with any other case subsequently advanced and involving a like question, as if they were one case.

8. Two or more cases, involving the same question, may, by order of the court, be heard together, and argued as one case or on such terms as may be prescribed.

9. If, after a case has been continued under paragraph 1 of this rule, both parties desire to have it heard at the term of the continuance, they may file with the clerk their joint request to that effect accompanied by their affidavits or those of their counsel giving the reasons why they failed to present their argument when the case was called and why it should be reinstated. Such a request will be granted only when it appears to the court that there was good reason for the previous failure to proceed and that the request can be granted without prejudice to parties in other cases coming on regularly for hearing.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

11. Cases on the summary docket will be heard specially as provided in paragraph 5 of Rule 7.

Rule 21. No appearance of appellant or petitioner.—Where no counsel appears and no brief has been filed for the appellant or petitioner when the case is called for hearing, the adverse party may have the appellant or petitioner called and the appeal or writ of certiorari dismissed, or may open the record and pray for an affirmance.

Rule 22. No appearance of appellee or respondent.—Where the appellee or respondent fails to appear when the case is called for hearing, the court may hear argument on behalf of the party appearing and give judgment according to the right of the case.

Rule 23. No appearance of either party.—When a case is reached in the regular call, and there is no brief or appearance for either party, the case shall be dismissed at the cost of the appellant or petitioner.

Rule 24. Neither party ready at second term.—When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the appellant or petitioner, unless strong cause is shown for further postponement.

Rule 25. Submission on briefs by one or both parties without oral argument.—

1. Any case may be submitted on printed briefs regardless of its place on the docket, if the counsel on both sides choose to submit the same in that manner, before the first Monday in May of any term. After that date cases may be submitted on briefs alone only as they are reached on the regular call.

2. When a case is reached on the regular call, if a printed brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

3. When a case is reached on the regular call and argued orally in behalf of only one of the parties, no brief for the opposite party will be received after the oral argument begins, except as provided in the next paragraph of this rule.

4. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave granted in open court after notice to opposing counsel.

Rule 26. Form of printed records, petitions, briefs, etc.—All records, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo

volume, having pages 6¼ by 9¼ inches and type matter 4¼ by 7¼ inches, except that records in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than small pica or 11-point type) adequately leaded; and the paper must be opaque and unglazed. The clerk shall refuse to receive any petition, motion or brief which has been printed otherwise than in substantial conformity to this rule.

Rule 27. Briefs.—1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief.

2. This brief shall be printed as prescribed in Rule 26 and shall contain in the order here indicated—

(a) A subject index of the matter in the brief, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

(b) A reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported.

(c) A concise statement of the grounds on which the jurisdiction of this court is invoked.

(d) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, e. g., (R. 12).

(e) A specification of such of the assigned errors as are intended to be urged. (See Rule 38, par. 2.)

(f) The argument (preferably preceded by a summary) exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon, and quoting the relevant parts of such statutes, federal and state, as are deemed to have an important bearing. If the statutes are long they should be set out in an appendix.

3. Whenever, in the brief of any party, a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific and if the reference is to an exhibit both the page number at which the exhibit appears and at which it was offered in evidence must be indicated.

4. The counsel for an appellee or respondent shall file with the clerk forty printed copies of his brief, at least one week before the case is called for hearing—such brief to be of like character with that required of the other party, except that no specification of errors need be given, and that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side.

5. Reply briefs will be received up to the time when the case is called for hearing.

6. When there is no assignment of errors, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified.

7. When, under this rule, an appellant or petitioner is in default, the court may dismiss the cause; and when an appellee or respondent is in default, the court may decline to hear oral argument in his behalf.

8. No brief, required by this rule, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

9. A brief of amicus curiae may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such brief must bear the name of a member of the bar of this court.

Rule 28. Oral argument.—1. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals or cross-writs of

certiorari they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

3. Two counsel, and no more, will be heard for each party, save that in cases on the summary docket (see Rule 7, paragraph 5) only one counsel will be heard on the same side.

4. In cases on the regular docket (except where questions have been certified) one hour on each side, and no more, will be allowed for the argument, unless more time be granted before the argument begins. The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing.

5. In cases where questions have been certified to this court three-quarters of an hour shall be allowed to each side for oral argument.

6. In cases on the summary docket one-half hour on each side, and no more, will be allowed for the argument.

Rule 29. Opinions of the court.—1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

Rule 30. Interest and damages.—1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court.

4. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

Rule 31. Procedendo to issue on dismissal.—In all cases of the dismissal of any appeal or writ of certiorari in this court, the clerk shall issue a mandate, or other proper process, in the nature of a procedendo, to the court below, so that further proceedings may be had in such court as to law and justice may appertain.

Rule 32. Costs.—1. In all cases where any appeal or writ of certiorari shall be dismissed in this court, costs shall be allowed to the appellee or respondent unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when only the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree by this court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. In cases where questions have been certified costs shall be equally divided unless otherwise ordered by the court, but where the entire record has been sent up (Rule 37, par. 2), and a decision is rendered on the whole matter in controversy, costs shall be allowed as provided in paragraphs 2 and 3 of this rule.

5. No costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, ten dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.

For an admission to the bar and certificate under seal, including filing of preliminary certificate and statements, fifteen dollars.

For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, eight cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements or motions when required by the rules, or at the request of counsel when, in the opinion of the clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, five dollars for each such petition, brief, jurisdictional statement or motion. Neither the expense of printing nor the clerk's supervising fee shall be allowed as costs in the case.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

Rule 33. Rehearing.—A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

Rule 34. Mandates.—Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session. (See Rules 31 and 35.)

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record.

Rule 35. Dismissing cases in vacation.—Whenever the appellant and appellee in an appeal, or the petitioner and respondent in a petition for a writ of certiorari, shall in vacation, by their attorneys of record, file with the clerk an agreement in writing that such appeal, petition for or writ of certiorari shall be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter such dismissal and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue on such dismissal without an order of the court. (See Rules 31 and 34.)

Rule 36. Appeals; by whom allowed; supersedeas.—1. In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court. In cases where an appeal may be had from a circuit court of appeals to this court the same may be allowed, in term time or in vacation by any judge of the circuit court of appeals or by a justice of this court. In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the requisite security therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal.

2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

Rule 37. Questions certified by a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia.—1. Where a circuit court of appeals or the United States Court of Appeals for the District of Columbia shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be so certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in such a cause it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up so that it may consider and decide the whole matter in controversy as upon appeal.

3. Where application is made for direction that the entire record be sent up, the application must be accompanied by a certified copy thereof. (As amended May 25, 1936.)

Rule 38. Review on writ of certiorari of decisions of State Courts, Circuit Courts of Appeals, and the United States Court of Appeals for the District of Columbia.—

1. A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. For printing record see paragraph 7 of this rule.

2. The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that

this court has jurisdiction to review the judgment or decree in question (see Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. See *United States v. Rimer*, 220 U. S. 547; *Furness, Withy & Co. v. Yang Tsze Insurance Assn.*, 242 U. S. 430; *Houston Oil Co. v. Goodrich*, 245 U. S. 440; *Layne & Bowler Corporation v. Western Well Works*, 261 U. S. 387, 392; *Magnum Import Co. v. Coty*, 262 U. S. 159, 163; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508. Forty printed copies of the petition and supporting briefs shall be filed.

The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925, except that in cases of petition to this court for writ of certiorari to review a judgment of the circuit court of appeals or of the United States Court of Appeals for the District of Columbia in criminal cases within the provisions of the act of March 8, 1934, the petition shall be made within the period prescribed pursuant to said Act in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666).

3. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court, or a justice thereof when the court is not in session), and due proof of service shall be filed with the clerk. If the United States, or an officer or agency thereof, is respondent, the service of the petition, record and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have twenty days, and where he resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, shall have twenty-five days (unless enlarged by the court, or a justice thereof when the court is not in session), after notice, within which to file forty printed copies of an opposing brief, conforming to Rules 26 and 27. The brief must bear the name of a member of the bar of this court at the time of filing.

(a) If the date for filing a brief in opposition falls in the summer recess, the brief may be filed within forty days after the service of the notice, but this enlargement shall not extend the time to a later date than September 10th.

4. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, record and briefs shall be distributed by the clerk to the court for its consideration.

(a) Timely reply briefs will be considered but distribution under this rule shall not be delayed pending the filing of such briefs.

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. (As amended May 31, 1938.)

(c) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United

States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court.

6. Section 8 (d) of the Act of February 13, 1925, prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending an application for review on writ of certiorari. The stay may be granted by a judge of the court rendering the judgment or decree, or by a justice of this court, and may be conditioned on the giving of security as in that section provided. (See Rule 36.)

7. Upon receipt of the certified transcript of the record the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the printing, and other probable fees, and shall furnish the same to the party docketing the case. Upon payment of the amount estimated by the clerk, forty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. But where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there. When the petition is presented it will suffice to furnish ten copies of the record as printed below together with the proceedings and opinion in that court; but if the petition is granted the requisite additional printed copies must be promptly supplied, and if not available the record must be reprinted under the supervision of the clerk.

8. Where it is necessary to print the record for the use of this court counsel should stipulate to omit from the printed record all matter not essential to a consideration of the questions presented by the petition for the writ, and when it is shown that unnecessary parts of the record have been printed although a reasonable effort was made by one of the parties to secure the printing of a proper record, such order as to costs may be made as the court shall deem proper.

Rule 39. Certiorari to a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia before judgment.—Proceedings to bring up to this court on writ of certiorari a case pending in a circuit court of appeals or the United States Court of Appeals for the District of Columbia, before judgment is given in such court, should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied. That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason.

Rule 40. Questions certified by the Court of Claims.—Where the Court of Claims shall certify to this court a question of law, concerning which instructions are desired for the proper disposition of the case, the certificate shall contain a statement of the case and of the facts on which such question arises. Questions of fact cannot be certified. The certification must be confined to definite and distinct questions of law.

Rule 41. Judgments of the Court of Claims; petitions for review on certiorari.—

1. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the court, and such other parts of the record as are material to the errors assigned. The petition shall contain a summary and short statement of the matter involved; the relevant parts of statutes involved (see Rule 27 (f)); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) The petition, brief and record shall be filed with the clerk and forty copies shall be printed under his supervision. The record shall be printed in the same way and upon the same terms that records on appeal are required to be printed. The estimated costs of printing shall be paid within five days after the estimate is furnished by the clerk and if payment is not so made the petition may be summarily dismissed. When the petition, brief and record are printed the petitioner shall forthwith serve copies thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

2. Within twenty days after the petition, brief and record are served (unless enlarged by the court, or a justice thereof when the court is not in session) the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs and record, shall be distributed by the clerk to the court for its consideration. (See Rule 38, par. 4 (a).)

The provision of subdivision (a) of paragraph 3 of Rule 38 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

3. The same general consideration will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims as are applied to applications for such writs to other courts. (See par. 5 of Rule 38.) (As amended March 25, 1940.)

Rule 42. Judgments of Court of Customs and Patent Appeals or of Supreme Court of Philippine Islands; petitions for review on certiorari.—Proceedings to bring up to this court on writ of certiorari a case from the Court of Customs and Patent Appeals or from the Supreme Court of the Commonwealth of the Philippines should conform, as near as may be, to the provisions of Rule 38. The same general considerations which control when such writs to other courts are sought will be applied to them. (As amended May 25, 1936.)

Rule 43. Order granting certiorari.—Whenever application for a writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the application. The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

Rule 44. Rules, costs, fees, and interest on certiorari.—Where not otherwise specially provided, the rules relating to appeals, including those relating to costs, fees and interest, shall apply, as far as may be, to petitions for, and causes heard on, certiorari.

Rule 45. Custody of prisoners pending review of proceedings in habeas corpus.—
1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

Rule 46. Review on appeal.—1. Appeals to this court from the district courts and the circuit courts of appeals are not affected by the Act of January 31, 1928, or the amendatory Act of April 26, 1928, both of which are copied in the appendix hereto. Such appeals, where admissible, must be sought, allowed and perfected as provided in other statutes and in the rules of this court. The Act of February 13, 1925, copied in the appendix hereto, shows when an appeal is admissible and when the mode of review is limited to certiorari.

2. Under the Act of January 31, 1928, as amended by the Act of April 26, 1928 the review which theretofore could be had in this court on writ of error may now be obtained on an appeal. But the appeal thereby substituted for a writ of error must be sought, allowed and perfected in conformity with the statutes theretofore providing for a writ of error. The appeal can be allowed only on the presentation of a petition showing that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, a review could be had in this court on writ of error. The petition must be accompanied by an assignment of error (see Rule 9) and statement as to jurisdiction (see Rule 12), and the judge or justice allowing the appeal must take proper security for costs and sign the requisite citation to the appellee. See paragraph 1 of Rule 10 and paragraph 1 of Rule 36. The citation must be served on the appellee or his counsel and filed, with proof of service, with the clerk of the court in which the judgment to be reviewed was entered. The mode of obtaining a supersedeas is pointed out in paragraph 2 of Rule 36. (As amended May 31, 1932, effective Sept. 1, 1932.)

Rule 47. Appeals under Act of August 24, 1937.—Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; provided, however, that when an appeal is taken under § 2 of the Act the service required by ¶ 2 of Rule 12 shall be made on all parties to the suit other than the party or parties taking the appeal. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed. (Added January 10, 1938.)

Rule 48. Joint or several appeals or petitions for writs of certiorari; summons and severance abolished.—Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

Rule 49. No session on Saturday.—The court will not hear arguments or hold open sessions on Saturday.

Rule 50. Adjournment of term.—The court will at every term announce, at least three weeks in advance, the day on which it will adjourn, and will not take up any case for argument, or receive any case upon briefs or upon petition for certiorari, within two weeks before the adjournment, unless otherwise ordered for special cause shown.

Rule 51. Abrogation of prior rules.—These rules shall become effective February 27, 1939, and be printed as an appendix to 306 U. S. The rules promulgated June 5, 1928, appearing in 275 U. S., Appendix, and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before these rules become effective.

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

I. Scope of Rules—One Form of Action:

- Rule 1. Scope of Rules.
- Rule 2. One Form of Action.

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders:

- Rule 3. Commencement of Action.
- Rule 4. Process:
 - (a) Summons: Issuance.
 - (b) Same: Form.
 - (c) By Whom Served.
 - (d) Summons: Personal Service.
 - (e) Same: Other Service.
 - (f) Territorial Limits of Effective Service.
 - (g) Return.
 - (h) Amendment.
- Rule 5. Service and Filing of Pleadings and Other Papers:
 - (a) Service: When Required.
 - (b) Same: How Made.
 - (c) Same: Numerous Defendants.
 - (d) Filing.
 - (e) Filing With the Court Defined.
- Rule 6. Time:
 - (a) Computation.
 - (b) Enlargement.
 - (c) Unaffected by Expiration of Term.
 - (d) For Motions—Affidavits.
 - (e) Additional Time After Service by Mail.

III. Pleadings and Motions:

- Rule 7. Pleadings Allowed; Form of Motions;
 - (a) Pleadings.
 - (b) Motions and Other Papers.
 - (c) Demurrers, Pleas, Etc., Abolished.
- Rule 8. General Rules of Pleading:
 - (a) Claims for Relief.
 - (b) Defenses; Form of Denials.
 - (c) Affirmative Defenses.
 - (d) Effect of Failure to Deny.
 - (e) Pleading to be Concise and Direct; Consistency.
 - (f) Construction of Pleadings.
- Rule 9. Pleading Special Matters:
 - (a) Capacity.
 - (b) Fraud, Mistake, Condition of the Mind.
 - (c) Conditions Precedent.
 - (d) Official Document or Act.
 - (e) Judgment.
 - (f) Time and Place.
 - (g) Special Damage.

Rule 10. Form of Pleadings:

- (a) Caption; Names of Parties.
- (b) Paragraphs; Separate Statements.
- (c) Adoption by Reference; Exhibits.

Rule 11. Signing of Pleadings.

Rule 12. Defense and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings:

- (a) When Presented.
- (b) How Presented.
- (c) Motion for Judgment on the Pleadings.
- (d) Preliminary Hearings.
- (e) Motion for More Definite Statement or for Bill of Particulars.
- (f) Motion to Strike.
- (g) Consolidation of Motions.
- (h) Waiver of Defenses.

Rule 13. Counterclaim and Cross-Claim:

- (a) Compulsory Counterclaims.
- (b) Permissive Counterclaims.
- (c) Counterclaim Exceeding Opposing Claim.
- (d) Counterclaim Against the United States.
- (e) Counterclaim Maturing or Acquired After Pleading.
- (f) Omitted Counterclaim.
- (g) Cross-Claim Against Co-Party.
- (h) Additional Parties May Be Brought in.
- (i) Separate Trials; Separate Judgments.

Rule 14. Third-Party Practice:

- (a) When Defendant May Bring in Third Party.
- (b) When Plaintiff May Bring in Third Party.

Rule 15. Amended and Supplemental Pleadings:

- (a) Amendments.
- (b) Amendments to Conform to the Evidence.
- (c) Relation Back of Amendments.
- (d) Supplemental Pleadings.

Rule 16. Pre-Trial Procedure; Formulating Issues.

IV. Parties:

Rule 17. Parties Plaintiff and Defendant; Capacity:

- (a) Real Party in Interest.
- (b) Capacity to Sue or Be Sued.
- (c) Infants or Incompetent Persons.

Rule 18. Joinder of Claims and Remedies:

- (a) Joinder of Claims.
- (b) Joinder of Remedies; Fraudulent Conveyances.

Rule 19. Necessary Joinder of Parties:

- (a) Necessary Joinder.
- (b) Effect of Failure to Join.
- (c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.

Rule 20. Permissive Joinder of Parties:

- (a) Permissive Joinder.
- (b) Separate Trials.

Rule 21. Misjoinder and Non-Joinder of Parties.

Rule 22. Interpleader.

Rule 23. Class Actions:

- (a) Representation.
- (b) Secondary Action by Shareholders.
- (c) Dismissal or Compromise.

Rule 24. Intervention.

- (a) Intervention of Right.
- (b) Permissive Intervention.
- (c) Procedure.

Rule 25. Substitution of Parties:

- (a) Death.
- (b) Incompetency.
- (c) Transfer of Interest.
- (d) Public Officers; Death or Separation from Office.

V. Depositions and Discovery.

Rule 26. Depositions Pending Action:

- (a) When Depositions May Be Taken.
- (b) Scope of Examination.
- (c) Examination and Cross-Examination.
- (d) Use of Depositions.
- (e) Objections to Admissibility.
- (f) Effect of Taking or Using Depositions.

Rule 27. Depositions Before Action or Pending Appeal:

- (a) Before Action:
 - (1) Petition.
 - (2) Notice and Service.
 - (3) Order and Examination.
 - (4) Use of Deposition.
- (b) Pending Appeal.
- (c) Perpetuation by Action.

Rule 28. Persons Before Whom Depositions May Be Taken:

- (a) Within the United States.
- (b) In Foreign Countries.
- (c) Disqualification for Interest.

Rule 29. Stipulations Regarding the Taking of Depositions.

Rule 30. Depositions Upon Oral Examination:

- (a) Notice of Examination: Time and Place.
- (b) Orders for the Protection of Parties and Deponents.
- (c) Record of Examination; Oath; Objections.
- (d) Motion to Terminate or Limit Examination.
- (e) Submission to Witness; Changes; Signing.
- (f) Certification and Filing by Officer; Copies; Notice of Filing.
- (g) Failure to Attend or to Serve Subpoena; Expenses.

Rule 31. Depositions of Witnesses Upon Written Interrogatories:

- (a) Serving Interrogatories; Notice.
- (b) Officer to Take Responses and Prepare Record.
- (c) Notice of Filing.
- (d) Orders for the Protection of Parties and Deponents.

Rule 32. Effect of Errors and Irregularities in Depositions:

- (a) As to Notice.
- (b) As to Disqualification of Officer.
- (c) As to Taking of Deposition.
- (d) As to Completion and Return of Deposition.

Rule 33. Interrogatories to Parties.

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Rule 35. Physical and Mental Examination of Persons:

- (a) Order for Examination.
- (b) Report of Findings.

Rule 36. Admission of Facts and of Genuineness of Documents:

- (a) Request for Admission.
- (b) Effect of Admission.

Rule 37. Refusal to Make Discovery: Consequences:

- (a) Refusal to Answer.
- (b) Failure to Comply with Order:
 - (1) Contempt.
 - (2) Other Consequences.
- (c) Expenses on Refusal to Admit.
- (d) Failure of Party to Attend or Serve Answers.
- (e) Failure to Respond to Letters Rogatory.
- (f) Expenses Against United States.

VI. Trials:

Rule 38. Jury Trial of Right:

- (a) Right Preserved.
- (b) Demand.
- (c) Same: Specification of Issues.
- (d) Waiver.

Rule 39. Trial by Jury or by the Court:

- (a) By Jury.
- (b) By the Court.
- (c) Advisory Jury and Trial by Consent.

Rule 40. Assignment of Cases for Trial.

Rule 41. Dismissal of Actions:

- (a) Voluntary Dismissal: Effect Thereof:
 - (1) By Plaintiff; By Stipulation.
 - (2) By Order of Court.
- (b) Involuntary Dismissal: Effect Thereof.
- (c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.
- (d) Costs of Previously-Dismissed Action.

Rule 42. Consolidation; Separate Trials:

- (a) Consolidation.
- (b) Separate Trials.

Rule 43. Evidence:

- (a) Form and Admissibility.
- (b) Scope of Examination and Cross-Examination.
- (c) Record of Excluded Evidence.
- (d) Affirmation in Lieu of Oath.
- (e) Evidence on Motions.

Rule 44. Proof of Official Record:

- (a) Authentication of Copy.
- (b) Proof of Lack of Record.
- (c) Other Proof.

Rule 45. Subpoena:

- (a) For Attendance of Witnesses; Form; Issuance.
- (b) For Production of Documentary Evidence.
- (c) Service.
- (d) Subpoena for Taking Depositions; Place of Examination.
- (e) Subpoena for a Hearing or Trial.
- (f) Contempt.

Rule 46. Exceptions Unnecessary.

Rule 47. Jurors:

- (a) Examination of Jurors.
- (b) Alternate Jurors.

Rule 48. Juries of Less than Twelve—Majority Verdict.

Rule 49. Special Verdicts and Interrogatories:

- (a) Special Verdicts.
- (b) General Verdict Accompanied by Answer to Interrogatories.

RULES OF CIVIL PROCEDURE

Rule 50. Motion for a Directed Verdict:

- (a) When Made: Effect.
- (b) Reservation of Decision on Motion.

Rule 51. Instructions to Jury: Objection.

Rule 52. Findings by the Court:

- (a) Effect.
- (b) Amendment.

Rule 53. Masters:

- (a) Appointment and Compensation.
- (b) Reference.
- (c) Powers.
- (d) Proceedings:
 - (1) Meetings.
 - (2) Witnesses.
 - (3) Statement of Accounts.
- (e) Report:
 - (1) Contents and Filing.
 - (2) In Non-Jury Actions.
 - (3) In Jury Actions.
 - (4) Stipulation as to Findings.
 - (5) Draft Report.

VII. Judgment:

Rule 54. Judgments; Costs:

- (a) Definition; Form.
- (b) Judgment at Various Stages.
- (c) Demand for Judgment.
- (d) Costs.

Rule 55. Default:

- (a) Entry.
- (b) Judgment:
 - (1) By the Clerk.
 - (2) By the Court.
- (c) Setting Aside Default.
- (d) Plaintiffs, Counterclaimants, Cross-Complainants.
- (e) Judgment Against the United States.

Rule 56. Summary Judgment:

- (a) For Claimant.
- (b) For Defending Party.
- (c) Motion and Proceedings Thereon.
- (d) Case Not Fully Adjudicated on Motion.
- (e) Form of Affidavits; Further Testimony.
- (f) When Affidavits are Unavailable.
- (g) Affidavits Made in Bad Faith.

Rule 57. Declaratory Judgments.

Rule 58. Entry of Judgment.

Rule 59. New Trials:

- (a) Grounds.
- (b) Time for Motion.
- (c) Time for Serving Affidavits.
- (d) On Initiative of Court.

Rule 60. Relief from Judgment or Order:

- (a) Clerical Mistakes.
- (b) Mistake; Inadvertence; Surprise; Excusable Neglect.

Rule 61. Harmless Error.

Rule 62. Stay of Proceedings to Enforce a Judgment:

- (a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings.
- (b) Stay on Motion for New Trial or for Judgment.
- (c) Injunction Pending Appeal.
- (d) Stay Upon Appeal.
- (e) Stay in Favor of the United States or Agency Thereof.
- (f) Stay According to State Law.
- (g) Power of Appellate Court not Limited.

Rule 63. Disability of a Judge.

VIII. Provisional and Final Remedies and Special Proceedings:

Rule 64. Seizure of Person or Property.

Rule 65. Injunctions.

- (a) Preliminary; Notice.
- (b) Temporary Restraining Order; Notice; Hearing; Duration.
- (c) Security.
- (d) Form and Scope of Injunction or Restraining Order.
- (e) Employer and Employee; Interpleader; Constitutional Cases.

Rule 66. Receivers.

Rule 67. Deposit in Court.

Rule 68. Offer of Judgment.

Rule 69. Execution:

- (a) In General.
- (b) Against Certain Public Officers.

Rule 70. Judgment for Specific Acts; Vesting Title.

Rule 71. Process in Behalf of and Against Persons Not Parties.

IX. Appeals:

Rule 72. Appeal from a District Court to the Supreme Court.

Rule 73. Appeal to a Circuit Court of Appeals:

- (a) How Taken.
- (b) Notice of Appeal.
- (c) Bond on Appeal.
- (d) Supersedeas Bond.
- (e) Failure to File or Insufficiency of Bond.
- (f) Judgment Against Surety.
- (g) Docketing and Record on Appeal.

Rule 74. Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished.

Rule 75. Record on Appeal to a Circuit Court of Appeals:

- (a) Designation of Contents of Record on Appeal.
- (b) Transcript.
- (c) Form of Testimony.
- (d) Statement of Points.
- (e) Record To Be Abbreviated.
- (f) Stipulation as to Record.
- (g) Record To Be Prepared by Clerk—Necessary Parts.
- (h) Power of Court to Correct Record.
- (i) Order as to Original Papers or Exhibits.
- (j) Record for Preliminary Hearing in Appellate Court.
- (k) Several Appeals.
- (l) Printing.

Rule 76. Record on Appeal to a Circuit Court of Appeals; Agreed Statement.

X. District Courts and Clerks:**Rule 77. District Courts and Clerks:**

- (a) District Courts Always Open.
- (b) Trials and Hearings; Orders in Chambers.
- (c) Clerk's Office and Orders by Clerk.
- (d) Notice of Orders or Judgments.

Rule 78. Motion Day.**Rule 79. Books Kept by the Clerk and Entries Therein:**

- (a) Civil Docket.
- (b) Civil Order Book.
- (c) Indices; Calendars.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence:

- (a) Stenographer.
- (b) Official Stenographers.
- (c) Stenographic Report or Transcript as Evidence.

XI. General Provisions:**Rule 81. Applicability in General:**

- (a) To What Proceedings Applicable.
- (b) Scire Facias and Mandamus.
- (c) Removed Actions.
- (d) District of Columbia; Courts and Judges.
- (e) Law Applicable.

Rule 82. Jurisdiction and Venue Unaffected.**Rule 83. Rules by District Courts.****Rule 84. Forms.****Rule 85. Title.****Rule 86. Effective Date.****I. SCOPE OF RULES—ONE FORM OF ACTION**

Rule 1. Scope of rules.—These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. One form of action.—There shall be one form of action to be known as "civil action."

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of action.—A civil action is commenced by filing a complaint with the court.

Rule 4. Process.—(a) **Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) **Same: Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any,

otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(c) By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other life process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) Same: Other Service. Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service

shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

(f) **Territorial Limits of Effective Service.** All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

(g) **Return.** The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavits thereof. Failure to make proof of service does not affect the validity of the service.

(h) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Rule 5. Service and filing of pleadings and other papers.—(a) **Service:** When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **Same: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 6. Time.—(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included,

unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

(c) **Unaffected by Expiration of Term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **For Motions—Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings allowed; Form of motions.—(a) **Pleadings.** There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) **Motions and Other Papers.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) **Demurrers, Pleas, Etc., Abolished.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 8. General rules of pleading.—(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and

plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to Be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading special matters.—(a) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been

performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

Rule 10. Form of pleadings.—(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Rule 11. Signing of pleadings.—Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.—(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of any motion

provided for in this rule alters the time fixed by these rules for serving any required responsive pleading as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement or for a bill of particulars, the responsive pleading may be served within ten days after the service of the more definite statement or bill of particulars. In either case the time for service of the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve on a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement or for Bill of Particulars.** Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements.

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.

(g) **Consolidation of Motions.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

(h) **Waiver of Defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by

motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

Rule 13. Counterclaim and cross-claim.—(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim Against the United States.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted Counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **Additional Parties May Be Brought in.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(i) **Separate Trials; Separate Judgments.** If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 14. Third-party practice.—(a) **When Defendant May Bring in Third Party.** Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party

to the action who is or may be liable to him or to a third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Rule 15. Amended and supplemental pleadings.—(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 16. Pre-trial procedure; formulating issues.—In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

IV. PARTIES

Rule 17. Parties plaintiff and defendant; capacity.—(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States

(b) **Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

(c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 18. Joinder of claims and remedies.—(a) **Joinder of Claims.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) **Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 19. Necessary joinder of parties.—(a) **Necessary Joinder.** Subject to the provisions of Rule 23 of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) **Effect of Failure to Join.** When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Plead. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

Rule 20. Permissive joinder of parties.—(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Rule 21. Misjoinder and non-joinder of parties.—Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 22. Interpleader.—(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24 (26) of the Judicial Code, as amended, U. S. C., Title 28, § 41 (26). Actions under that section shall be conducted in accordance with these rules.

Rule 23. Class actions.—(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may

properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Rule 24. Intervention.—(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, § 1.

Rule 25. Substitution of parties.—(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or

joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation from Office. When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Depositions pending action.—(a) When Depositions May Be Taken. By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by

subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rule 32 (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 27. Depositions before action or pending appeal.—(a) Before Action.

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the district court of the United States in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall

make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a district court of the United States, in accordance with the provisions of Rule 26 (d).

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 28. Persons before whom depositions may be taken.—(a) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(b) In Foreign Countries. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Rule 29. Stipulations regarding the taking of depositions.—If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 30. Depositions upon oral examination.—(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The

notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Rule 31. Depositions of witnesses upon written interrogatories.—(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Rule 32. Effect of errors and irregularities in depositions.—(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made

before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Rule 33. Interrogatories to parties.—Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

Rule 34. Discovery and production of documents and things for inspection, copying, or photographing.—Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 35. Physical and mental examination of persons.—(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to

all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Findings.

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

Rule 36. Admission of facts and of genuineness of documents.—(a) Request for Admission. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Rule 37. Refusal to make discovery: consequences.—(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply With Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the

district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) Failure to Respond to Letters Rogatory. A subpoena may be issued as provided in the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U. S. C., Title 28, § 711, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

VI. TRIALS

Rule 38. Jury trial of right.—(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any

time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by jury or by the court.—(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 40. Assignment of cases for trial.—The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 41. Dismissal of actions.—(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court, (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

(c) **Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of Previously-Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 42. Consolidation; separate trials.—(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 43. Evidence.—(a) **Form and Admissibility.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) **Scope of Examination and Cross-Examination.** A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

(c) **Record of Excluded Evidence.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) **Affirmation in Lieu of Oath.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Rule 44. Proof of official record.—(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

Rule 45. Subpoena.—(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents.

(c) Service. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the

district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the Act of July 3, 1926, c. 762, §§ 1, 3 (44 Stat. 835), U. S. C., Title 28, §§ 711, 713.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Rule 46. Exceptions unnecessary.—Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 47. Jurors.—(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

Rule 48. Juries of less than twelve—Majority verdict.—The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Rule 49. Special verdicts and interrogatories.—(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Rule 50. Motion for a directed verdict.—(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 51. Instructions to jury: objection.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. Findings by the court.—(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its

conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 53. Masters.—(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring

the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

VII. JUDGMENT

Rule 54. Judgments; costs.—(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues

material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 55. Default.—(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Rule 56. Summary judgment.—(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may,

at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.—The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58. Entry of judgment.—Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party

recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry.

Rule 59. New trials.—(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

Rule 60. Relief from judgment or order.—(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Rule 61. Harmless error.—No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of proceedings to enforce a judgment.—(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated

herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

(g) Power of Appellate Court not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof.

Rule 63. Disability of a judge.—If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of person or property.—At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Rule 65. Injunctions.—(a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party.

(b) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service of otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of

August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress.

Rule 66. Receivers.—The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules.

Rule 67. Deposit in court.—In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Sections 995 and 996, Revised Statutes, as amended, U. S. C., Title 28, §§ 851, 852; the Act of June 26, 1934, c. 756, § 23 (48 Stat. 1236), U. S. C., Title 31, § 725v; or any like statute.

Rule 68. Offer of judgment.—At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

Rule 69. Execution.—(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Section 989, Revised Statutes, U. S. C., Title 28, § 842, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c. 130, § 8 (18 Stat. 401), U. S. C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

Rule 70. Judgment for specific acts; vesting title.—If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or

judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Rule 71. Process in behalf of and against persons not parties.—When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

IX. APPEALS

Rule 72. Appeal from a district court to the Supreme Court.—When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal.

Rule 73. Appeal to a circuit court of appeals.—(a) **How Taken.** When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(b) **Notice of Appeal.** The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) **Bond on Appeal.** Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(d) **Supersedeas Bond.** Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the

property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(e) Failure to File or Insufficiency of Bond. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) Judgment Against Surety. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

(g) Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

Rule 74. Joint or several appeals to the Supreme Court or to a circuit court of appeals; summons and severance abolished.—Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.

Rule 75. Record on appeal to a circuit court of appeals.—(a) Designation of contents of Record on Appeal. Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included.

(b) Transcript. If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record.

(c) Form of Testimony. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) Statement of Points. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(e) Record To Be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) Stipulation as to Record. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals.

(h) Power of Court to Correct Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.

(i) Order as to Original Papers or Exhibits. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) Several Appeals. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) Printing. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the circuit court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court.

Rule 76. Record on appeal to a circuit court of appeals; agreed statement.—When the questions presented by an appeal to a circuit court of appeals can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal.

X. DISTRICT COURTS AND CLERKS

Rule 77. District courts and clerks.—(a) District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgment, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

Rule 78. Motion day.—Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Rule 79. Books kept by the clerk and entries therein.—(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C., Title 28, § 568, or other statutory authority, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be

marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Order Book. The clerk shall also keep a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all final judgments and orders, all orders affecting title to or lien upon real or personal property, all appealable orders, and such other orders as the court may direct.

(c) Indices; Calendars. Separate and suitable indices of the civil docket and of the civil order book shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

Rule 80. Stenographer; stenographic report or transcript as evidence.—(a) Stenographer. A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering the transcript.

(b) Official Stenographers. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

(c) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

XI. GENERAL PROVISIONS

Rule 81. Applicability in General.—(a) To What Proceedings Applicable.

(1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy¹ or proceedings in copyright² under the Act of March 4, 1909, c. 320, § 25 (35 Stat. 1081), as amended, U. S. C., Title 17, § 25, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the District Court of the United States for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo war-

¹ The rules were made applicable in bankruptcy proceedings by amendment of General Orders in Bankruptcy Nos. 36 and 37, effective Feb. 13, 1939 (see p. 578 of this volume).

² Rule 1 of the Copyright Rules was amended, effective Sept. 1, 1939, to read as follows: "Proceedings in actions

brought under section 25 of the Act of March 4, 1909, entitled 'An Act to amend and consolidate the acts respecting copyright,' including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules."

ranto, and forfeiture of property for violation of a statute of the United States.

(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the district courts of the United States to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the district courts of the United States prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), U. S. C., Title 29, §§ 159 and 160 (e), (g), and (i), for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese, or to proceedings for review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act,³ Act of March 4, 1927, c. 509, § 21 (44 Stat. 1436), U. S. C., Title 33, § 921. The provisions for service by publication and allowing the defendant 60 days within which to answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § 405, remain in effect.

(7) In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable.

(b) *Scire Facias* and *Mandamus*. The writs of *scire facias* and *mandamus* are abolished. Relief heretofore available by *mandamus* or *scire facias* may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) *Removed Actions*. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party

³ By order adopted on Dec. 28, 1939, the Supreme Court amended the first sentence of Rule 81(a)(6), effective three months after adjournment of the second regular session of the 76th Congress, so as to read:

"(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479) as amended, U. S. C., Title 8, § 282, relating

to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act."

entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States.

(d) District of Columbia; Courts and Judges. Whenever in these rules reference is made to a district court or to a district judge, the reference includes the District Court of the United States for the District of Columbia or a justice thereof; and whenever reference is made to a circuit court of appeals or to a judge thereof, the reference includes the United States Court of Appeals for the District of Columbia or a justice thereof.

(e) Law Applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the District Court of the United States for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the District Court of the United States for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

Rule 82. Jurisdiction and venue unaffected.—These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

Rule 83. Rules by district courts.—Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 84. Forms.—The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.

Rule 85. Title.—These rules may be known and cited as the Federal Rules of Civil Procedure.

Rule 86. Effective date.—These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

RULES OF PRACTICE AND PROCEDURE AFTER PLEA OF GUILTY, VERDICT OR FINDING OF GUILT, IN CRIMINAL CASES BROUGHT IN THE DISTRICT COURTS OF THE UNITED STATES AND IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Rule

1. Sentence.
2. Motions.
3. Appeals.
4. Control by appellate court.
5. Supersedeas.
6. Bail.
7. Directions for preparation of record on appeal.

Rule

8. Record on appeal without bill of exceptions.
9. Bill of exceptions.
10. Setting the appeal for argument.
11. Writs of certiorari.
12. Local rules.
13. [Definitions—Computation of time.]

Order

Pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an act entitled "An act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict" (Act of February 24, 1933, c. 119, 8 F. C. A., tit. 28, § 723[a])—

It is ordered on this seventh day of May, 1934, that the following rules be adopted as the rules of practice and procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in district courts of the United States and in the District Court of the United States for the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

It is further ordered that these rules shall be applicable to proceedings in all cases in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered, ON OR AFTER THE FIRST DAY OF SEPTEMBER, 1934.

Rule 1. Sentence.—After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259 [7 F. C. A., tit. 18, § 724], sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment, or for a new trial is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail. (As amended May 24, 1937.)

Rule 2. Motions.—(1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

(2) Save as provided in subdivision (3) of this rule, motions in arrest of judgment, or for a new trial, shall be made within three [3] days after verdict or finding of guilt.

(3) Except in capital cases a motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty [60] days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. In capital cases the motion may be made at any time before execution of the judgment. (As amended May 31, 1938.)

(4) A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

Rule 3. Appeals.—An appeal shall be taken within five [5] days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule 2, the appeal may be taken within five [5] days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed. [Form 772, supra.]

Rule 4. Control by appellate court.—The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appellate court may at any time, upon five [5] days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

Rule 5. Supersedeas.—An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence. The trial court or the circuit court of appeals may stay the execution of any sentence to pay a fine or fine and costs upon such terms as it may deem proper. It may require the defendant pending the appeal to pay to the clerk in escrow the whole or any part of such fine and costs, to submit to an examination as to his assets, or to give a supersedeas bond, and it may likewise make any appropriate order to restrain the defendant from dissipating his assets and thereby preventing the collection of such fine. [As amended Oct. 21, 1940.]

Rule 6. Bail.—The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court.

Rule 7. Directions for preparation of record on appeal.—The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.

Rule 8. Record on appeal without bill of exceptions.—When it appears that the appeal is to be prosecuted upon the clerks' record of proceedings, that is, upon the indictment and other pleadings and the orders, opinions, and judgment of the trial court, without a bill of exceptions, the trial judge shall direct the appellant to file with the clerk of the trial court, within a time stated, an assignment of the errors of which he complains (which may amplify or add to the grounds stated in the notice of appeal), and shall direct the clerk to forward promptly, with his certificate, to the appellate court the above-mentioned record and assignment of errors, and upon receipt thereof the appellate court shall at once set the appeal for argument as provided in these rules.

Rule 9. Bill of exceptions.—In cases other than those described in Rule 8, the appellant, within thirty [30] days after the taking of the appeal, or within such further time as within said period of thirty [30] days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule 8. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five [5] days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

Rule 10. Setting the appeal for argument.—Save where good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than thirty [30] days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar of the appellate court will permit. Preference shall be given to criminal appeals over appeals in civil cases.

Rule 11. Writs of certiorari.—Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within thirty [30] days after the entry of the judgment of that court. Such petition shall be made as prescribed in Rules 38 and 39 of the rules of the Supreme Court of the United States.

Rule 12. Local rules.—Each appellate court may prescribe rules, not inconsistent with the foregoing rules, with respect to cost bonds, the procedure on the hearing of appeals, the issue of mandates, and the time and manner in which petitions for rehearing may be presented.

Rule 13. [Definitions—Computation of time.]—In the foregoing rules, the phrase "trial court" shall be deemed to refer to the district courts of the United States

and the District Court of the United States for the District of Columbia; the phrase "trial judge" includes the judge before whom the case was tried or brought to judgment and, in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried or brought to judgment; the phrase "appellate court" shall be deemed to refer to the United States Circuit Court of Appeals and Court of Appeals of the District of Columbia.

For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under federal law or under the law of the state where the case was brought) shall be excluded.

INDEX

References are to Forms

A

ABSENT DEFENDANT,

See PROCESS.

ACCORD AND SATISFACTION,

See ANSWERS AND MOTIONS.

ACCOUNT,

See ANSWERS AND MOTIONS; COMPLAINTS.

accord and satisfaction, 241, 242.

liquidated amount, answer of, 241.

unliquidated amount, answer of, 242.

actions upon, 79, 81, 83, 117.

arbitration and award, 249, 250.

agreement to, answer, 250.

answer of, 249.

consideration, 254, 255.

destruction of goods before delivery, answer, 255.

failure of title to property, answer, 254.

exchange of credits, answer of, 264.

goods sold and delivered, 80.

merchandise sold and delivered, 80.

money had and received, 83.

money lent, 81.

mutual exchange of credits, answer of, 264.

payment, answer of, 258.

rent, 117.

ACT OF GOD,

defense of, answer, 276.

ACTS, OFFICIAL

performance, allegations of, 122.

ADMINISTRATOR,

See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION,

answer of, 287.

AGENCY OF UNITED STATES,

See UNITED STATES.

AGRICULTURAL ADJUSTMENT ACT,

See SECRETARY OF AGRICULTURE.

ALIENS,

actions by or against, 67, 68.

deportation proceedings, habeas corpus,

order dismissing writ, 790.

order for writ, 786.

petition for, 789.

service of writ, return of, 787.

writ of, 787.

patent infringement, United States, suits against, 902.

References are to Forms

AMENDED AND SUPPLEMENTAL PLEADINGS,

See ANSWERS AND MOTIONS.

- amended pleadings, 379.
- answers, amended, 379.
 - counterclaim, motion for leave, 224.
 - motion for leave, 375.
 - notice of motion, 376.
 - order extending time to amend, 378.
 - order granting leave, 377.
- answers, supplemental, 386.
 - counterclaim, motion for leave, 223.
 - motion for leave to serve, 383.
 - notice of motion, 384.
 - order granting leave to serve, 385.
- complaints, amended, 379.
 - dismissal, order for, 382.
 - motion for leave, 375.
 - notice of motion, 376, 380.
 - order extending time to amend, 378.
 - order granting leave, 377, 381.
- complaints, supplemental, 386.
 - motion for leave to serve, 383, 387.
 - notice of motion, 384, 388.
 - order granting leave to serve, 385, 389.
- counterclaim, 223, 224.
 - motion for leave to plead by amended answer, 224.
 - motion for leave to plead by supplemental answer, 223.
- dismissal of amended complaint, order, 382.
- motion for leave to amend, 375.
- motion for leave to plead counterclaim, 223, 224.
 - amended answer, 224.
 - supplemental answer, 223.
- motion for leave to serve supplemental pleading, 383, 387.
- notice,
 - motion for leave to amend, 376, 380.
 - motion to serve supplemental pleading, 384, 388.
- order,
 - dismissing amended complaint, 382.
 - extending time to amend, 378.
 - granting leave to amend, 377, 381.
 - granting leave to serve supplemental pleading, 385, 389.
- supplemental pleadings, 386.

AMOUNT IN CONTROVERSY,

See ANSWERS AND MOTIONS; COMPLAINTS; REMOVAL OF CAUSES.

ANSWERS AND MOTIONS,

See AMENDED AND SUPPLEMENTAL PLEADINGS; DEPOSITION AND DISCOVERY;
INTERVENTION; PARTIES TO ACTIONS; TRIAL OF CIVIL ACTIONS.

- accord and satisfaction, 241, 242.
 - liquidated amount, 241.
 - unliquidated amount, 242.
- accounts, exchange of credits, 264.
- act of God, 276.
- administrators, 227, 267.
 - denial of trust relationship, 227.
 - promises by, 267.
- admission of allegations of complaint, 221, 222.
- adverse possession, 287.
- amended answers, 379.
 - motion for leave, 375.
 - notice of motion, 376.
 - order extending time to amend, 378.
 - order granting leave to amend, 377.

References are to Forms

ANSWERS AND MOTIONS—Continued.

- amount in controversy, insufficiency,
 - motion, 218, 220.
 - notice of motion, 218.
- arbitration, 249.
 - agreement to, 250.
- assignment colorable for federal jurisdictional purposes, 284.
- assignments, denial, 226.
- associations, 225, 230.
 - denial of existence, 225.
 - unincorporated, denial of capacity to sue, 230.
- assumption of risk, 240.
- attorneys, champerty or maintenance, 283.
- bankruptcy, discharge in, 245.
 - statute of frauds, 269.
- bill of particulars,
 - motion for, 213.
 - motion to strike out pleading for failure to furnish, 215.
 - order for, 214.
 - order striking out pleading for failure to furnish, 216.
- bond, release of surety by alteration of, 291.
- champerty or maintenance, 283.
- checks, failure to cash, insolvency of bank, 274.
- codefendants, claims against, 221.
- coercion, 246.
- complaint, motion to make more specific,
 - bill of particulars, motion for, 213.
 - bill of particulars, order for, 214.
 - motion for, 211.
 - order for, 212.
- conditions precedent, failure to perform, 265.
- consideration,
 - failure, destruction of goods prior to delivery, 255.
 - failure of title to property sold, 254.
 - illegality, 247.
- consolidation of actions,
 - notice of motion for, 547.
 - order for, 548.
- consolidation of issues,
 - notice of motion for, 550.
 - order for, 551.
- constitutionality of statute,
 - Agricultural Adjustment Act, denial of,
 - answer of United States in intervention, 1020.
 - intervention by United States,
 - motion for leave, 1018.
 - order granting leave to intervene, 1019.
 - denial of,
 - answer, 282.
 - answer in intervention by United States, 368.
 - certification of notice to Attorney-General, 361, 364.
 - intervention, answer by United States, 368.
 - intervention by United States, order for, 360, 369.
 - motion of United States to intervene, 367.
 - notice to Attorney-General, 360, 362, 365.
 - order for certification of notice to Attorney-General, 363, 366.
 - order permitting United States to intervene, 360, 369.
 - trial, notice to Attorney-General, 362.
- constitutions or laws of United States, failure to allege action under, motion to dismiss, 541.
- contracts,
 - conditions precedent, failure to perform, 265.
 - fraud in procuring, 251.
 - reliance on representations, 252.
 - limitation of action by, 266.
 - limitation of liability, 275.

References are to Forms

ANSWERS AND MOTIONS—Continued.

- contracts,
 - performance not within a year, 271.
 - performance prevented by plaintiff, 286.
 - release of surety by alteration of contract, 277, 291.
 - rescission, 261, 288.
 - usury, 278.
 - waiver, 285.
- conversion, election of remedies, 292.
- corporations,
 - denial of existence, 225.
 - motion of stockholders to intervene in representative suit by other stockholders against corporation, 358.
 - ultra vires, 280.
- costs, security for, 207.
 - motion, 205.
 - order for, 206.
- counterclaims, 221, 222.
 - amended answer, motion for leave to file, 224.
 - interpleader, 222.
 - supplemental pleading, motion for leave to file, 223.
 - third parties, 222.
- covenants, performance prevented by plaintiff, 286.
- credits, exchange of, 264.
- cross-claim, codefendants, claim against, 221.
- debt or default of another, statute of frauds, 273.
- definite statement, complaint,
 - bill of particulars, 213, 214.
 - motion for, 213.
 - order for, 214.
 - motion for, 211.
 - order for, 212.
- denial of knowledge of facts concerning liability, 221.
- denial of liability, 221, 222.
- discharge in bankruptcy, 245.
- dismissal of complaint,
 - failure to state claim upon which relief can be granted, 218, 219, 382, 541.
 - jurisdiction, lack of, 218, 220.
 - motion for, 218, 220.
 - notice of motion, 218.
 - order for, 219, 382.
 - process, failure to serve, 218, 220.
 - process, insufficiency, motion for, 218, 220.
 - venue, improper, 218, 220.
- diversity of citizenship, lack of,
 - motion, 218, 220.
 - notice of motion, 218.
- duress, 246.
- election of remedies, 292.
- estoppel, 253.
- executor, denial of status, 227.
- executors, promises by, 267.
- extension of time of payment, 262.
- failure to state claim upon which relief can be granted,
 - motion, 218, 221, 541.
 - notice of motion, 218.
 - order, 219, 382.
- federal jurisdictional, colorable assignment, 284.
- fellow servant, injury by, 248.
- fraud, 251, 252.
 - contracts procured by, 251.
 - representations, reliance upon, 252.
- gambling transactions, 247.
- God, act of, 276.
- guardians, denial of trusteeship, 229.

References are to Forms

ANSWERS AND MOTIONS—Continued.

- Heard Act,
 - complaint in intervention of subcontractor for labor furnished, 354.
 - motion of subcontractor to intervene for labor furnished, 352.
 - order permitting subcontractor to intervene for labor furnished, 353.
- illegal consideration, 247.
- infancy of defendant, 281.
- insurer of defendant, motion to intervene, 355.
- interest, usury, 278.
- interrogatories, objections to, 217.
- intervention,
 - answers of interveners, 351, 354, 368.
 - constitutionality of Agricultural Adjustment Act, 1018-1020.
 - answer in intervention of United States, 1020.
 - motion of United States for leave, 1018.
 - order granting United States leave to intervene, 1019.
 - motions to, 350, 352, 355-358, 367.
 - orders for, 353, 359, 360, 369.
- issues, separation for trial of, notice of motion for, 549.
- joinder of defenses and objections,
 - motions, 218, 220-222.
 - notice of motion, 218.
- joint obligor, omission of, 221.
- judgment, res judicata, 260.
- jurisdiction, lack of,
 - colorable assignment for federal jurisdictional purposes, 284.
 - motion, 218, 220.
 - notice of motion, 218.
- lashes, 256.
- liability, limitation by contract, 275.
- libel, 289, 290.
 - privilege, 290.
 - truth, 289.
- license for use of patent, 257.
- lienor, motion to intervene in mortgage foreclosure, 357.
- limitation of actions, 221, 266, 293.
 - contract limiting, 266.
- limitations, statute of, adverse possession, 287.
- maintenance or champerty, 283.
- marriage, promises in consideration of, statute of frauds, 272.
- master and servant, 240, 248.
 - assumption of risk, 240.
 - fellow-servant, injuries by, 248.
- misjoinder of defendants,
 - motion to drop defendant, 325.
 - order dropping defendant, 326.
- mortgages, motion of lienor to intervene in foreclosure suit, 357.
- negligence,
 - assumption of risk, 240.
 - contributory, 243, 244.
 - fellow servant, injuries by, 248.
 - plaintiff's, 243, 244.
- notes, release of surety by alteration of, 277.
- novation, exchange of credits, 264.
- novation, payment by note, 263.
- objections, joinder,
 - motions, 218, 220, 221, 222.
 - notice of motion, 218.
- parties, omission of joint obligor, motion, 221.
- partnership, denial of existence, 228.
- patent infringement,
 - intervener, answer alleging prior patent, 351.
 - license for use, answer, 257.
 - motion of manufacturer and vendor of defendant to intervene, 350.
 - prior patent, answer of, 351.

References are to Forms

ANSWERS AND MOTIONS—Continued.

- payment, 258, 259.
 - check, failure to cash, insolvency of bank, 274.
 - extension of time, 262.
 - mutual exchange of credits, 264.
 - novation, note, 263.
 - tender, 279.
- performance, failure to perform conditions precedent, 265.
- process, failure to serve, 218.
 - motion, 218.
 - notice of motion, 218.
- process, insufficiency, 218, 220.
 - motion, 218, 220.
 - notice of motion, 218.
- property, destruction of goods before delivery, 255.
 - property, failure of title, 254, 255.
- quashing summons,
 - motion, 218, 220.
 - notice of motion, 218.
- quiet title, motion of claimant to intervene, 356.
- real estate,
 - adverse possession, 287.
 - contracts for sale of, statute of frauds, 268.
 - motion of claimant to intervene in quiet title suit, 356.
 - motion of lienor to intervene in mortgage foreclosure, 357.
- receivers, denial of capacity to be sued, 231.
- release, 241, 242, 259.
 - surety, alteration of contract, 277, 291.
- remedies, election, 292.
- representations, fraudulent, 251.
 - reliance upon, 252.
- rescission of contract, 261, 288.
- res judicata, 260.
- risk, assumption of, 240.
- sales,
 - destruction of property before delivery, 255.
 - election of remedies, 292.
 - failure of title, 254.
 - rescission, 288.
 - statute of frauds, 268, 270.
- satisfaction and accord, 241, 242.
- separation of issues for trial of, notice of motion for, 549.
- slander, privilege, 290.
- slander, truth, 289.
- statute of frauds,
 - bankruptcy, discharge in, 269.
 - debt on default of another, promises to answer for, 273.
 - executor or administrator, promises by, 267.
 - marriage, promises in consideration of, 272.
 - performance not within a year, 271.
 - real estate, sale of, 268.
 - sales of goods, 270.
- stockholders, motion to intervene in representative suit against corporation, 358.
- striking out parts of complaint, 208-210.
 - motion, 208.
 - notice of motion, 209.
 - order striking out redundant matter, 210.
- striking out pleading, 215, 216.
 - motion, failure to furnish bill of particulars, 215.
 - order, failure to furnish bill of particulars, 216.
- subcontractor,
 - complaint in intervention under Heard Act for labor furnished, 354.
 - motion to intervene under Heard Act for labor furnished, 352.
 - order granting leave to intervene under Heard Act for labor furnished, 353.

References are to Forms

ANSWERS AND MOTIONS—Continued.

- supplemental answers, 386.
 - motion for leave to serve, 383.
 - notice of motion, 384.
 - order granting leave to serve, 385.
- supplemental pleading of counterclaim, motion for leave to file, 223.
- surety, release by alteration of contract, 277, 291.
- tender, 279.
- third party practice, 300-303.
 - denial of leave to bring in third party, order, 302.
 - granting leave to bring in third party, order, 301.
 - motion to bring in, 300, 303.
- truth of allegations of complaint, admission, 221, 222.
- ultra vires of corporations, 280.
- unincorporated associations, denial of capacity to sue, 230.
- unlawful consideration, 247.
- usury, 278.
- venue, improper, 218, 220.
 - motion, 218, 220.
 - notice of motion, 218.
- waiver, 285.

APPEALS,

See TAXES.

- cease and desist orders of Federal Trade Commission, review of, 958, 959.
 - order allowing petition for, 959.
 - petition for, 958.
- certiorari, Court of Claims, petition for writ to review action of, 908.
- Circuit Court of Appeals, appeals to,
 - costs, bond for, 705.
 - criminal cases,
 - bill of exceptions, 776.
 - order for extension of time to settle and file, 775.
 - order settling, 776.
 - bond, supersedeas, 774.
 - notice of, 772, 773.
 - appeal to Circuit Court of Appeals for the District of Columbia, 773.
 - precipe for transcript, 777.
 - stipulation as to exhibits, 776.
 - stipulation of correctness of transcript, 776.
- dismissal of appeal, motion for notice, 713.
- Federal Communication Commission, radio station, denial of application for, 967-969.
 - acknowledgment of service of copy of reasons for appeal, 968.
 - notice of appeal, 967.
 - notice of intent of third person to intervene on appeal, 969.
 - reasons for appeal, 968.
- Federal Trade Commission, cease and desist orders of, 958, 959.
 - order allowing petition for review, 959.
 - petition for review, 958.
- mandate of Circuit Court of Appeals, 714-716.
 - order of District Court in compliance with mandate, 716.
 - remanding cause to District Court, 715.
 - staying, order for, 714.
- National Labor Relations Board, orders of, 1000, 1002-1005.
 - decree on appeal, 1005.
 - intervention by another labor union, 1002, 1003.
 - order granting leave, 1003.
 - petition for leave, 1002.
 - petition for review, 1000.
 - rehearing, petition for, 1004.
- notice of appeal from entire judgment, 703.
- notice of appeal from part of judgment, 704.
- points of appeal, appellant's statement, 711.
- remanding cause to district court, order for, 715.

References are to Forms

APPEALS—Continued.

- Circuit Court of Appeals, appeals to,
 - Securities and Exchange Commission, orders of, 975-979.
 - confidential treatment, 977, 979.
 - order granting leave to file petition for review, denial of, 979.
 - petition to review order denying, 977.
 - notice of petition for review, 978.
 - orders granting petitions for review, 976, 979.
 - petitions for review, 975, 977.
 - service of notice of petition for review, acknowledgment of service, 978.
 - stop orders, 975, 976.
 - order granting petition for review, 976.
 - petition for review of, 975.
 - statement of points of appeal, appellants, 711.
 - staying mandate of Circuit Court of Appeals, order for, 714.
 - stipulations for transcript of record, 712.
 - supersedeas bond, 706.
 - transcript of record, 707-710, 712.
 - designation of parts to be included, 708-710.
 - appellant's, 708.
 - appellee's, 709, 710.
 - extension of time to file, motion for, 707.
 - stipulation of, 712.
- Court of Claims, certiorari, petition to Supreme Court for writ of review, 908.
- criminal cases,
 - bill of exceptions, 776.
 - exhibits, stipulation waiving, 776.
 - extension of time to settle and file, 775.
 - order settling, 776.
 - stipulation of correctness, 776.
 - exhibits, stipulation waiving, 776.
 - notice of appeal to,
 - Circuit Court of Appeals, 772.
 - Circuit Court of Appeals for the District of Columbia, 773.
 - precipe for transcript, 777.
 - supersedeas bond, 774.
 - transcript of record, 776, 777.
 - exhibits, stipulation waiving, 776.
 - precipe for, 777.
 - stipulation of correctness, 776.
- intervention on appeal, radio station, denial of application for, notice of intervention, 969.
- National Labor Relations Board, orders of, 1000, 1002-1005.
 - decree on appeal, 1005.
 - intervention by another labor union, 1002, 1003.
 - order granting leave, 1003.
 - petition for leave, 1002.
 - petition for review, 1000.
 - rehearing, petition for, 1004.
- radio station, denial of application for,
 - intervention on appeal by third party, notice of intention, 969.
 - notice of appeal, 967.
 - reasons for appeal, service of copy of, acknowledgment, 968.
- Securities and Exchange Commission, orders of,
 - petition for review, 975, 977.
 - notice of, 978.
 - order granting, 976, 979.
 - service of notice for, acknowledgment of service, 978.
- Supreme Court,
 - appeals direct from District Courts, 690-700.
 - assignment of errors, 692.
 - bond for costs, 699.

APPEALS—Continued.

- Supreme Court,
 - appeals direct from District Courts,
 - bond, supersedeas, 700.
 - citation to appellee, 695.
 - costs, bond for, 699.
 - errors, assignment of, 692.
 - jurisdiction, appellant's statement of, 698.
 - notice to appellee, 695.
 - order of Court of Appeals permitting appeal, 694.
 - order of trial court permitting appeal, 693.
 - petition to Court of Appeals, 691.
 - petition to trial court, 690.
 - points relied upon, statement by appellant, 697.
 - record, designation of portion necessary to determine appeal, appellant's statement, 697.
 - statement of jurisdiction, appellants, 698.
 - statement of points and designation of portions of record, appellants, 697.
 - stipulations for transcript of record, 696.
 - supersedeas bond, 700.
 - transcript of record, 696, 697.
 - designation of portion necessary to determine appeal, appellants, 697.
 - stipulation for, 696.
 - certiorari to review action of Court of Claims, petition for writ, 908.

ARBITRATION AND AWARD,

See ANSWERS AND MOTIONS.

- agreement to, answer, 250.
- answer of, 249.

ARREST,

See CRIMINAL PROCEDURE; NE EXEAT; PROCESS.

ARREST OF JUDGMENT,

See CRIMINAL PROCEDURE.

ASSIGNMENTS,

- denial of, answer, 226.
- federal jurisdictional purposes, answer of, 284.
- jurisdictional purposes, answer of, 284.

ASSOCIATIONS,

See CORPORATIONS.

- capacity to sue, denial, 230.
- designation, captions, 3, 4.
- existence, denial, 225.
- process upon, 20.
- return of service of process upon, 20.
- service of process upon, 20.
- suits by, denial of capacity, 230.

ASSUMPTION OF RISK,

See NEGLIGENCE.

ATTACHMENT,

- writs, contempt, failure to appear and show cause, 676.
- order for, 675.

ATTORNEYS,

- champerty or maintenance, answer of, 283.

AWARD,

See ARBITRATION AND AWARD,

References are to Forms

B

BANKRUPTCY,

See ORDERS IN BANKRUPTCY.

- adjudication, debtor not a bankrupt, 824.
- adjudication of, 825.
- answer of bankrupt, 811.
- appraisers, appointment, oath, 826.
- arrangements with creditors,
 - confirmation,
 - acceptance by less than all creditors, order for, 871.
 - acceptance of all creditors, order for, 870.
 - application for, 869.
 - meeting of creditors, notice of, 868.
 - petition for, 867.
- assets,
 - report of no asset estate, 859.
 - schedules of, 805.
 - statement of affairs, 806, 807.
- corporate reorganizations,
 - answer and contravention by secured creditor, 890.
 - answer to petition, 890, 895.
 - confirmation of plan, order for, 891.
 - petition for, 889, 892, 894.
 - notice of approval, 893.
 - order approving, 893.
- creditors,
 - claims,
 - affidavit of loss of negotiable instrument, 851.
 - agent or attorney, proof by, 850.
 - corporations, proof by, 848.
 - denial of, order for, 852.
 - expunging, order for, 852.
 - individuals, proof by, 847.
 - negotiable instrument, loss of, proof by affidavit, 851.
 - partnerships, proof by, 849.
 - reduction, order for, 852.
 - dividends, order for payment, 853.
 - meetings,
 - agents, attendance by, power of attorney, 832.
 - agents, attendance by, special power of attorney, 833.
 - notice to, 831, 868, 873, 878, 886.
 - petition, 809.
 - trustee, order approving appointment by, 834.
- discharge, 864.
 - answer alleging, 245, 269.
 - objections to, 863.
 - notice of order fixing time for filing, 862.
 - order fixing time for filing, 861.
 - specifications of, 863.
 - petition for, 860.
- dividends, order for payment of, 853.
- examination of bankrupt, order for, 845.
- farmers, composition or extension proposals,
 - confirmation, 887, 888.
 - application for, 887.
 - order for, 888.
 - meeting of creditors, notice of, 886.
 - petition for, 882.
 - approval of, order, 883.
- liabilities, 805-807.
 - schedule of, 805.
 - statement of affairs, 806, 807.

References are to Forms

BANKRUPTCY—Continued.

- marshal as receiver,
 - bond, 837.
 - bond of applicant, 813.
 - counter bond for retention of property by bankrupt, 820.
- orders in bankruptcy, Nos. 1-56, pp. 572-588.
- petition,
 - affairs, statement of, 806, 807.
 - answer of bankrupt, 811.
 - creditors, 809.
 - debtors, 805, 808, 867, 872, 877, 882, 889.
 - arrangements with creditors, 867.
 - corporate reorganizations, 889.
 - farmers, composition and extension proposals, 882.
 - partnerships, 808.
 - real property arrangements, 872.
 - wage earners, arrangements with creditors, 877.
 - involuntary, 809.
 - notice to bankrupt, 810.
 - schedules, of assets and liabilities, 805.
 - voluntary, 805, 808, 867, 872, 877, 882, 889.
- property, custody, control, and disposal of,
 - appraisers, appointment, oath, 826.
 - consignment, 821, 822.
 - order reclamation of property held by bankrupt as consignee, 822.
 - petition to reclaim property held by bankrupt as consignee, 821.
 - examination of bankrupt, order for, 845.
 - exempted property, report of trustee, 858.
 - fraudulent conveyance, suit by trustee to set aside, 101.
 - no asset estate, 859.
 - discharge of trustee, report for, 859.
 - report of, 859.
 - possession of,
 - motion to require bankrupt to surrender property to trustee, 839.
 - order for third person to show cause for not surrendering bankrupt's property to trustee, 842.
 - order for third person to surrender bankrupt's property to trustee, 843.
 - order requiring bankrupt to surrender property to trustee, 840.
 - petition to require third person to surrender bankrupt's property to trustee, 841.
 - reclamation of property held by bankrupt as consignee, 821, 822.
 - order authorizing, 822.
 - petition for, 821.
 - redemption of real estate from mortgage, 856, 857.
 - order authorizing, 857.
 - petition for authority, 856.
 - sale of real estate, 854, 855.
 - order for, 855.
 - petition for, 854.
- real property arrangements,
 - confirmation,
 - acceptance by all creditors, order for, 875.
 - acceptance by less than all creditors, order for, 876.
 - application for, 874.
 - meeting of creditors, notice of, 873.
 - petition for, 872.
- receivers,
 - ancillary, 815, 816.
 - application for appointment, 815.
 - order appointing, 816.
 - application for appointment, 812.
 - attorneys for, 817-819.
 - appointment of, petition for authority, 817.
 - fees, petition for, 819.
 - order authorizing retention of, 818.

References are to Forms

BANKRUPTCY—Continued.

- receivers,
 - bond, 837.
 - counter bond for retention of property by bankrupt, 820.
 - bond of applicant for appointment, 813.
 - fees or commissions, petition for, 823.
 - order appointing, 814.
 - report of, 823.
- referees,
 - bond, 830.
 - cash book, 865.
 - financial statement, 866.
 - oath of office, 829.
 - reference to, 827, 828.
 - order for general reference, 827.
 - order in judge's absence, 828.
 - schedules of assets and liabilities, 805.
 - subpoena to bankrupt, 810.
 - subpoena to witnesses, 846.
- trustees,
 - appointment of,
 - creditors, order approving appointment by, 834.
 - notice to trustee, 836.
 - order that no appointment be made, 844.
 - referee, order for appointment by, 835.
 - bond, 837.
 - approval, order for, 838.
 - discharge, no asset estate, report of, 859.
 - report of,
 - exempted property, 858.
 - no asset estate, 859.
- wage earners, arrangements with creditors,
 - confirmation,
 - acceptance by all creditors, order for, 880.
 - acceptance by less than all creditors, order for, 881.
 - application for, 879.
 - meeting of creditors, notice of, 878.
 - petition for, 877.

BILL OF PARTICULARS,

See ANSWERS AND MOTIONS.

BILLS IN EQUITY,

See RECEIVERS.

BOARD OF TAX APPEALS,

See TAXES.

BONDS,

- bail, 745.
- bail piece, 746.
- bankruptcy,
 - receiver,
 - applicant for, bond of, 813.
 - counter bond for retention of property by bankrupt, 820.
 - receiver's bond, 837.
 - referee, bond of, 830.
 - trustee's bond, 837.
- contractors, suits on for labor and materials under Heard Act, 100.
- costs, 207.
 - appeals from District Court direct to Supreme Court, 699.
 - appeals to Circuit Court of Appeals, 705.
- receivers, orders for, 163, 164, 165.
- recognizance, 745.
- removal of cause, 193.
 - approval, 192.

References are to Forms

BONDS—Continued.

- restraining orders, 138.
- supersedeas,
 - appeals from District Court direct to Supreme Court, 700.
 - appeals to Circuit Court of Appeals, 706, 774.
 - criminal case, appeals of, 774.

C

CAPACITY TO SUE,
allegations of, 120.

CAPTIONS,

- administrators, 5.
- associations, 3, 4.
- corporations, 4.
- executors, 5.
- guardians, 9.
- individuals, 1.
- next friend, 8.
- partners, 2.
- trustees, 5-7, 9.
 - use of another, 6.
 - statutory, 7.
- unincorporated associations, 3.

CAUSES, REMOVAL OF,

See REMOVAL OF CAUSES.

CERTIORARI,

- order for writ for Supreme Court to review action of Board of Tax Appeals, 925.
- petition to Supreme Court for writ to review action of Court of Claims, 908.

CHAMPERTY,

- answer of, 283.

CITIZENS,

- actions by or against, allegations, 59-68.
- cancellation of citizenship for fraud, 112.
 - judgment for, 635.
- cancellation of citizenship for residence abroad, 111.
 - judgment for, 635.
- deportation proceedings, habeas corpus,
 - order dismissing writ, 790.
 - order for writ, 786.
 - petition for, 789.
 - service of writ, return of, 787.
 - writ of, 787.
- diversity of citizenship, allegations, 59-68.
- naturalization, indictment for illegal production of certificate of, 733.

CITIZENSHIP,

See CITIZENS.

CIVIL ACTIONS,

See TRIAL OF CIVIL ACTIONS.

CLAIMS,

See UNITED STATES.

CLASS ACTIONS,

See CORPORATIONS.

COMMITTEE OF PERSON OR PROPERTY,

See GUARDIAN AND WARD.

References are to Forms

COMMUNICATIONS COMMISSION,

See FEDERAL COMMUNICATIONS COMMISSION.

COMPETITION,

See UNFAIR COMPETITION.

COMPLAINTS,

See CAPTIONS; PETITIONS.

- account, 79.
 - goods sold and delivered, 80.
 - rent (New Jersey form), 117.
- accounting, stockholder's suit in behalf of corporation, 105.
- administrator, allegation of capacity, 120.
- amended, 379.
 - motion for leave, 375.
 - notice of motion, 376, 380.
 - order extending time to amend, 378.
 - order granting leave to amend, 377, 381.
- amount in controversy, 59-70.
- bankruptcy, suit by trustee, fraudulent conveyance, setting aside, 101.
- citizenship,
 - cancellation for fraud, 112.
 - cancellation, residence abroad, 111.
- committee of person and property, allegation of capacity, 120.
- Constitution of the United States, suits under, 69.
- contractor's bond, 100.
- contracts,
 - annulment for fraud, 106.
 - breach of, 84, 900.
 - Tucker Act, 96.
 - United States, 900.
 - cancellation because of mistake, 107.
 - cancellation for fraud, 106.
 - conditions precedent, allegations of performance, 121.
 - covenants, negative, restraint of violations, 99.
 - promissory notes, 78.
 - English form, 113.
 - rescission because of mistake, 107.
 - specific performance, 88.
- conversion, 87.
- copyright infringement, 93.
- corporations, 105, 120.
 - receivers, allegation of capacity, 120.
 - stockholder's suit in behalf of, 105.
- criminal offenses, 725.
- death, wrongful (English form), 115.
- debt and fraudulent conveyance, 89.
- declaratory judgments, 95.
- declaratory relief and interpleader, 94, 95.
- defendants, 124, 305.
 - omission of, allegation, 124.
 - third parties brought in, allegations, 305.
- diversity of citizenship, 59-68.
 - aliens, suits against, 67.
 - amount in controversy, 59-70.
 - corporate alien against citizen, 68.
 - individual against corporation, 60.
 - individual against individual, 59.
 - individual against others who are citizens of different states, 62.
 - individual against others who are citizens of same state, 61.
 - individual against partnership, 65.
 - individuals who are citizens of different states against individuals who are citizens of same state, 64.
 - individuals who are citizens of same state against individuals who are citizens of another state, 63.
 - partnership against corporation, 66.
- documents, official, allegations of, 122.

References are to Forms

COMPLAINTS—Continued.

- dynamite caps, negligent manufacture or distribution, 102.
- Employers' Liability Act, 90.
- employment, loss of through libel, 125.
- English forms, 113-116.
- executor, allegation of capacity, 120.
- federal question, 69-72.
- fraudulent conveyance and debt, 89.
 - bankruptcy, suit by trustee, 101.
- goods sold and delivered, 80.
- guardian ad litem, allegation of capacity, 120.
- guardian, allegation of capacity, 120.
- Heard Act, 100.
 - subcontractors, intervention, complaint or answer in, 354.
- interpleader and declaratory relief, 94, 95.
- joint and/or several liability, negligence, 86.
- judgments, allegations of rendition, 123.
- laws of the United States, suits under, 70, 71.
- libel, employment, loss of, 125.
- Lord Campbell's Act, 115.
- Merchant Marine Act, 91.
- money had and received, 83.
- money lent, 81.
- money paid by mistake, 82.
- mortgages,
 - conveyance by, 97.
 - lien foreclosure, 98.
 - trustee, allegation of capacity, 120.
- motor vehicle collision, 104.
 - English form (carriage), 114.
- negligence, 85, 86.
- New Jersey form, 117.
- next friend, allegation of capacity, 120.
- offenses, criminal, 725.
- official acts and documents, allegations of, 122.
- orders, allegations of entry, 123.
- parties, omission of allegations, 124.
- patents,
 - infringement, 92, 902.
 - infringement (English form), 116.
 - issuance of, allegation, 122.
- plaintiff, omission of, allegations, 124.
- poor persons, 55, 56.
 - affidavit to prosecute as, 55.
 - order for action as, 56.
- promissory note, 78.
 - English form, 113.
- reckless, wilful, or negligent injury, 86.
- rent (New Jersey form), 117.
- sales, delivery, loss from failure, 126.
- specific performance, 88.
- subcontractors,
 - bonds, suits under Heard Act, 100.
 - intervention, complaint or answer under Heard Act, 354.
- supplemental, 386.
 - motion for leave to serve, 383, 387.
 - notice of motion, 384, 388.
 - order granting leave to serve, 385, 389.
- taxes,
 - collection by United States, 108.
 - refund, 109, 901.
 - refund, suits against collector, 109.
- third party, allegations, 305.
- trade-name, illegal use, 103.
- treaties of the United States, suits under, 72.
- trustee, allegation of capacity, 120.

References are to Forms

COMPLAINTS—Continued.

- Tucker Act, 96.
 - suits under, 75.
- United States,
 - suits by, 73.
 - suits by officer of, 74.
 - suits under Tucker Act, 75.
- war risk insurance, suit for, 110.
- wilful, reckless or negligent injury, 86.

CONSPIRACY,

See CRIMINAL PROCEDURE.

CONTEMPT,

civil

- attachment for failure to appear and show cause, 676.
 - order for issuance, 675.
 - writ for, 676.
- depositions, refusal to be sworn or to answer questions,
 - notice of motion to punish for, 670.
 - order and sentence, 671, 677.
 - order to show cause for refusal, 672, 673.
- injunction, violation of, denial of motion to punish for, 674.

criminal,

- information for violation of restraining order, 678.
- judgment and sentence, 680.
- petition to punish for violation of restraining order, 679.
- restraining order, 678-680.
 - information for violation of, 678.
 - judgment and sentence for violation of, 680.
 - petition to punish for violation of, 679.

CONTRACTOR,

- labor and materials, suits under Heard Act, 100.

CONTRACTS,

See PROMISSORY NOTES; UNITED STATES.

- annulment for fraud, 106
- breach of, 84, 96, 900.
 - interrogatories to parties, 455.
 - special damages, inability to purchase goods for resale, allegation, 126.
 - United States, suit under Tucker Act, 96.
 - waiver, answer, 235.
- conditions precedent, 121, 265.
 - allegation of performance, 121.
 - failure to perform, answer, 265.
- consideration,
 - destruction of goods before delivery, 255.
 - failure of title to property sold, answer, 254.
 - illegality, answer of, 247.
- covenants, suits to enjoin violation, 99.
 - judgment on, 618.
 - order, 147(5), 147(6).
 - performance prevented by plaintiff, answer, 286.
- duress, answer of, 246.
- fraud,
 - answer of, 251.
 - reliance on representations, answer, 252.
 - suit to annul, 106.
 - statute of,
- frauds, statute of,
 - bankruptcy, discharge in, answer, 269.
 - debt, default or miscarriage of another, promises to answer for, answer, 273.
 - executor or administrator, promises by, answer, 267.
 - marriage, promise in consideration of, answer, 272.

References are to Forms

CONTRACTS—Continued.

- frauds, statute of,
 - performance not within a year, answer, 271.
 - real estate sale of, answer, 268.
 - sale of goods, answer, 270.
- gambling transactions, answer of, 247.
- illegality, answer of, 247.
- infancy of defendant, answer, 281.
- liability limited by, answer, 275.
- limitation of action by, answer, 266.
- limitation of liability by, answer, 275.
- negative covenant, enjoining violation, 99.
 - judgment, 618.
- rescission,
 - answer of, 261, 288.
 - contract for sale of goods, agreement to, answer, 288.
 - ground of mistake, 107.
- specific performance, 88.
 - judgment, 624.
- surety, release by alteration, answer, 277, 291.
- Tucker Act, suits under, 96.
- usury, answer of, 278.
- war risk insurance, suits for, 110.

CONVERSION,

- election of remedies, answer of, 293.
- suits for, 87.

COPYRIGHTS,

- infringement, suit for, 93.
- restraining violation, 93.
 - order, 147(3).

CORPORATE AGENT OF UNITED STATES,

See UNITED STATES.

CORPORATIONS,

- actions against, diversity of citizenship, 66.
- alien corporation, suits against citizen, allegations, 68.
- associations, designation, caption, 3.
- bankruptcy,
 - claim against bankrupt, proof of, 848.
 - reorganization in,
 - answer and contravention by secured creditor, 890.
 - confirmation of plan, order for, 891.
 - petition for, 889.
- deposition,
 - notice of taking, 410, 411.
 - notice, vacation for failure to name officer deponent, motion for, 413.
 - officer, vacation of notice for failure to name, motion for, 413.
- designation, caption, 4.
- dividends, interpleader to determine right to, judgment upon, 630.
- existence, answer denying, 225.
- mismanagement, suits by stockholders, 105.
- process upon, 20, 23, 24.
 - municipal, 24.
 - quashing summons, reference to special master, order for, 585.
 - return service of process, 20, 23, 24.
- receivers, order appointing, 163, 164.
- representative suit by stockholders,
 - notice of motion for leave to dismiss, 533.
 - notice of proposed dismissal, 531.
 - order for service of proposed dismissal, 532.
 - order of dismissal, 534.

References are to Forms

CORPORATIONS—Continued.

- stockholders,
 - class actions, 105.
 - notice of motion for leave to dismiss, 533.
 - notice of proposed dismissal, 531.
 - order for service of notice of proposed dismissal, 532.
 - order of dismissal, 534.
 - intervention in representative suit by other stockholders against corporation, motion for, 358.
- ultra vires,
 - answer of, 280.
 - judgment restraining or enjoining, 622.
 - order restraining or enjoining, 147(9).

COSTS,

- bonds for, 207, 699, 705.
 - appeals direct to Supreme Court, 699.
 - appeals to Circuit Court of Appeals, 705.
- dismissal of action, voluntary,
 - motion to require payment of, 543.
 - order requiring payment of costs, 544.
- judgment for, 631-634.
- security, 205, 206.
 - motion for, 205.
 - order for, 206.
- taxation of,
 - notice of, 637.
 - review, motion for, 638.
 - review, order of, 639.

COTTON QUOTAS,

See SECRETARY OF AGRICULTURE.

COUNTERCLAIM,

See CROSS-CLAIMS.

- allegation of, 221.
- amended answer setting up, motion for leave to file, 224.
- interpleader, 222.
- supplemental pleading setting up motion for leave to file, 223.
- third party, joinder, 222.

COUNTERFEITING,

See CRIMINAL PROCEDURE.

COURT OF CLAIMS, ACTIONS IN,

See UNITED STATES.

COURT RULES,

See RULES OF CIVIL PROCEDURE, DISTRICT COURTS; RULES OF CRIMINAL PROCEDURE; RULES OF SUPREME COURT.

CREDITORS' BILLS,

See RECEIVERS.

CRIMINAL PROCEDURE,

See HABEAS CORPUS; RULES OF CRIMINAL PROCEDURE.

- abatement, plea in, 751.
- acquittal, former, plea of, 761.
- appeals,
 - bill of exceptions, 776.
 - extension of time to settle and file, order for, 775.
 - settling, order for, 776.
 - stipulation as to exhibits, 776.
 - stipulation that transcript of record is true, 776.
 - notice of, 772, 773.
 - Circuit Court of Appeals, appeal to, 772.
 - Circuit Court of Appeals for the District of Columbia, 773.

References are to Forms

CRIMINAL PROCEDURE—Continued.

- appeals,
 - precipe for transcript of record, 777.
 - supersedeas bond, 774.
- arrest,
 - bench warrant, 743.
 - capias, return of service, 744.
 - warrant on complaint, 726.
- bond, 745, 746.
 - bail piece, 746.
 - recognizance, 745.
- commitment, return of execution of, 769.
- complaint, 725.
- conspiracy,
 - demurrer to indictment, 758.
 - fugitive from justice, harboring, aiding, abetting, or concealing, indictment for, 740.
 - quash indictment, motion to, 752-754.
- contempt, 678-680.
 - information, violation of restraining order, 678.
 - judgment and sentence, 680.
 - petition to punish violation of restraining order, 679.
- conviction, former, plea of, 761.
- counterfeiting coins, indictment for, 736.
- grand jury, insufficiency of evidence before, motion to quash indictment, 753.
- guilty, plea of, 728, 760.
- indictments, 729-740.
 - demurrer, 756-758.
 - motions to quash, 752-754.
 - order quashing, 755.
 - order sustaining demurrer, 759.
- information, 727, 728.
- internal revenue laws, taxes, failure to pay, indictments for, 731, 732, 735.
- intoxicating liquors, 732, 735, 739.
 - Indians, selling to, indictment for, 739.
 - taxes, failure to pay, indictment for, 732, 735.
- jeopardy, former, plea of, 762.
- judgment,
 - arrest, motion to, 770.
 - duplicity, indictment bad for, 770.
 - jurisdiction, lack of, 770.
 - notice of motion, 770.
 - order granting motion, 771.
 - public offense, failure of indictment to charge, 770.
 - conviction, judgment on, 769.
 - plea of guilty, judgment on, 769.
 - return of execution of, 769.
 - sentence for contempt for violation of restraining order, 680.
- mails, using to defraud, indictment for, 730.
- naturalization, certificate of, illegal production, indictment for, 733.
- new trial,
 - motion for, 766, 767.
 - demurrer, overruling, 766.
 - evidence, 766, 767.
 - erroneous admission of, 766.
 - erroneous exclusion of, 766.
 - newly discovered, 767.
 - instructions, giving erroneous, 766.
 - instructions, refusal to give, 766.
 - jury, 760, 766.
 - bailiff in charge not sworn 763.
 - disqualification of juror, 766.
 - permitting to separate, 766.
 - receipt of communications from outside sources, 766.
 - refusal to sustain challenge to juror, 766.

References are to Forms

CRIMINAL PROCEDURE—Continued.

- new trial,
 - motion for,
 - misconduct of counsel, 766.
 - mistrial, overruling motion for, 766.
 - newly discovered evidence, 767.
 - quash, overruling motion to, 766.
 - verdict, directed, overruling motion for, 766.
 - notice of motion, 766.
 - order granting, 768.
- pardon, plea of, 763.
- perjury, indictment for, 734.
 - demurrer to, 757.
 - motion to quash, 754.
- process, 743, 744.
 - bench warrant, 743.
 - capias, return of service, 744.
 - warrant of arrest, 726.
- recognizance, 745.
- removal,
 - application for warrant of, 741
 - habeas corpus,
 - order for, 798.
 - petition for, 797.
 - writ, 787.
 - warrant of, 742.
- search warrant, 747.
 - evidence, suppression of, 749, 750.
 - motion for, 749.
 - order for, 750.
 - quash, motion to, 748.
- smuggling,
 - goods, wares or merchandise, indictment for, 737.
 - opium, indictment for, 738.
- statute of limitations, plea of, 764.
- subpoena, return of service, 765.

CROSS-CLAIMS,

See COUNTERCLAIM.

- allegation of, 221.
- codefendant, against, 221.

D

DEATH,

See WRONGFUL DEATH.

DECLARATORY JUDGMENTS,

See JUDGMENTS.

- action for, 94, 95.
- notes, promissory, judgment determining validity, 627.
- patent rights, suit to determine, 95.
 - judgment upon, 628.

DEFAULTS,

See JUDGMENTS.

DEFENDANTS,

See PARTIES TO ACTIONS; PROCESS.

DEFENSES,

- accord and satisfaction, 241, 242.
- accounting, settlement, 264.
- act of God, 276.
- additional parties, 222.
- administrators, denial of trust relationship, 227.

References are to Forms

DEFENSES—Continued.

admission of allegations of complaint, 221, 222.
adverse possession, 287.
agreement to arbitrate, 250.
amended answer, counterclaim, motion for leave, 224.
arbitration and award, 249, 250.
assignment, denial of, 226.
association, denial of existence, 225.
association, unincorporated, denial of capacity to sue, 230.
assumption of risk, 240.
bankruptcy, discharge in, 245.
champerty or maintenance, 283.
check in payment, failure to present, 274.
codefendants, cross-claims against, 221.
coercion, 246.
colorable assignment for jurisdictional purposes, 284.
compromise and settlement, 241, 242, 249, 259.
conditions precedent, failure to perform, 265.
consideration, failure, 254, 255.
consideration, illegality, 247.
Constitution or laws of United States, failure to allege action under, motion, 541.
contributory negligence, 243, 244.
conversion, election of remedies, 292.
corporation, denial of existence, 225.
corporations, ultra vires, 280.
counterclaim, 221, 222.
 additional parties, 222.
 amended answer, motion for leave, 224.
 supplemental pleading, motion for leave, 223.
covenants, performance prevented by plaintiff, 286.
credits, exchange of, 264.
cross-claims against codefendant, 221.
destruction of goods prior to delivery, 255.
dismissal, motion, 218.
duress, 246.
election of remedies, 292.
estoppel, 253.
executor, denial of status, 227.
extension of time of payment, 262.
fellow servant, injuries by, 248.
fraud, contract procured by, 251.
fraud, reliance upon representations, 252.
gambling transactions, 247.
goods, sale of, 288, 292.
 election of remedies, 292.
 rescission, 288.
guardian, denial of trusteeship, 229.
improper parties, 221.
infancy, 281.
interpleader, additional parties, 222.
joinder, motion, 218, 220-222.
joinder, notice of motion, 218.
jurisdiction, colorable assignment, 284.
laches, 256.
liability, denial, 221, 222.
liability, denial of knowledge of facts, 221.
liability limited by contract, 275.
libel, privilege of, 290.
libel, truth of, 289.
masters, special, order for reference to, 589.
misjoinder of defendants, 325, 326.
 motion for, 325.
 order for, 326.
mutual exchange of credits, 264.
negligence, injuries by fellow servant, 248.

References are to Forms

DEFENSES—Continued.

- negligence on part of plaintiff, 243, 244.
- novation, 263.
- parties, additional, 222.
- parties, omissions, improper, 221.
- partnerships, denial of existence, 228.
- patent infringement,
 - license to use, answer, 257.
 - motion of defendant's manufacturer and vendor to intervene, 350.
 - prior patent, answer of, 351.
- payment, 258, 259.
 - check, failure to present, 274.
 - exchange of credits, 264.
 - note, 263.
 - novation, 263.
 - tender, 279.
- performance prevented by plaintiff, 286.
- receivers, denial of capacity to be sued, 231.
- release, 259.
- rescission of contract, 261, 288.
- res judicata, 260.
- slander, privilege of, 290.
- slander, truth of, 289.
- statute of frauds,
 - bankruptcy, discharge in, 269.
 - contract not to be performed within a year, 271.
 - debt of another, 273.
 - executor or administrator, promise by, 267.
 - goods, sale of, 270.
 - marriage, promise in consideration of, 272.
 - real estate, sale of, 268.
- statute of limitations, 221, 266.
 - time limited by contract, 266.
- supplemental pleadings, counterclaim, motion for leave, 223.
- surety, release by alteration of contract, 277, 291.
- tender, 279.
- title to property purchased, failure, 254.
- truth of allegations, admission, 221, 222.
- ultra vires, 280.
- unconstitutionality of statute, 282.
- unincorporated associations, denial of capacity to sue, 230.
- unlawful consideration, 247.
- usury, 278.
- waiver, 285.

DEPOSITION AND DISCOVERY,

See PRETRIAL PROCEDURE.

- admissions,
 - documents, genuineness of, requests for, 477, 479.
 - extension of time to reply, 481, 482.
 - notice of motion for, 481.
 - order for, 482.
 - insurance matters, requests for, 480.
 - refusal to admit, expenses,
 - notice of motion for payment for refusal, 496.
 - order denying motion for payment of for refusal to admit, 498.
 - order for payment for refusal to admit, 497.
 - reply to request for, 483.
 - request for, 477, 479, 480.
 - English practice, 478.
- depositions, 405-452.
 - additional deposition,
 - vacation of notice to take on grounds no necessity shown, 414.
 - certificate of officer taking deposition, 436.

References are to Forms

DEPOSITION AND DISCOVERY—Continued.

- depositions,
 - expenses,
 - failure to subpoena witness, 442, 443.
 - motion for expenses, 442.
 - order for payment of expenses, 443.
 - failure to take, 440, 441.
 - motion for expenses, 440.
 - order for payment of expenses, 441.
- foreign countries, 424-429.
 - commission to take, 426.
 - letters rogatory, 429.
 - motion for commission to take, 424.
 - motion for letters rogatory, 427.
 - order granting motion for commission, 425.
 - order granting motion for letters rogatory, 428.
- form of, 435.
- individuals, notice of taking deposition of, 407-409.
- interrogatories, 444-452.
- limitation of examination, 431-434.
 - persons permitted to attend,
 - motion for limitation as to, 431.
 - order for limitation as to, 433, 434.
 - place, 431, 434.
 - motion for limitation as to, 431.
 - motion that deposition be taken by interrogatories because of distance from place of trial, 431.
 - order fixing, 434.
 - order requiring deposition to be taken by interrogatories, 434.
 - publication only by order of court, 431, 434.
 - motion for limitation, 431.
 - order granting motion, 434.
 - subject-matter, 431-434.
 - motion for limitation as to, 431, 432.
 - motion for limitation as to on grounds of bad faith, 432.
 - order limiting as to because of bad faith, 433.
 - order limiting scope of inquiry, 434.
 - time, order fixing, 434.
- notice of filing, 439.
- notice of taking,
 - corporations, 410, 411.
 - individuals, 407-409.
 - order denying motion to vacate, 416.
 - order for vacation of notice, 415.
 - vacation for failure to obtain leave, motion, 412.
 - vacation for fatal defect, motion, 413.
 - vacation on grounds deposition already taken, motion, 414.
- objections to taking,
 - motion for, 431, 451.
 - removal of witness, order that deposition be not taken, 434.
- stipulations to take, 430.
- suppression of, 437, 438.
 - notice of motion to suppress because officer was not qualified, 437.
 - notice of motion to suppress, insufficient time allowed for travel, 437.
 - order suppressing deposition because officer was not qualified, 438.
 - order suppressing deposition for failure to allow sufficient traveling time, 438.
- termination of examination,
 - bad faith, 432, 433.
 - motion to terminate on grounds of, 432.
 - order to terminate, 433.
- depositions before issues joined,
 - motion for leave to take, 405.
 - motion to vacate notice to take for failure to obtain leave, 412.

References are to Forms

DEPOSITION AND DISCOVERY—Continued.

- depositions before issues joined,
 - order granting leave, 406.
 - vacation of notice to take for failure to obtain leave, motion for, 412.
- documents,
 - copies of order for, 467.
 - expenses,
 - notice of motion to require payment for failure to admit genuineness, 496.
 - order denying motion for payment of expenses for failure to admit genuineness, 498.
 - order for payment of expenses for failure to admit genuineness, 497.
 - genuineness of, request for admission of, 477, 479.
 - inspection of,
 - admissibility, notice of motion to prohibit for failure to allow inspection, 493.
 - motion for, 466.
 - order for, 467.
 - photographs of, 466, 468.
 - motion for, 466.
 - order for, 468.
 - production of, 466, 467.
 - motion for, 466.
 - order for, 467.
 - subpoena, notice of motion for issuance of, 559.
 - subpoena, order for issuance of, 560.
- enforcement, 486-500.
 - admissions, notice of motion to require payment of expenses for refusal to, 496.
 - arrest for failure to obey order to answer questions, notice of motion, 495.
 - contempt,
 - notice of motion to punish for, 670.
 - order and sentence for, 671, 677.
 - order for writ of attachment for failure to appear and show cause, 675.
 - order to show cause for refusal, 672, 673.
 - writ of attachment for failure to appear and show cause, 676.
 - dismissal of action for failure to appear, 499, 500.
 - notice of motion, 499.
 - order for, 500.
 - documents,
 - genuineness, 496-498.
 - notice of motion to require payment of expenses for refusal to admit, 496.
 - order denying motion for payment of expenses for refusal to admit, 498.
 - order requiring payment of expenses for refusal to admit, 497.
 - notice of motion to prevent introduction in evidence for refusal to permit inspection, 493.
 - interrogatories,
 - default judgment, notice of motion for failure to appear for deposition or to answer interrogatories, 499.
 - establishment of facts for failure to answer interrogatories, notice of motion, 491.
 - notice of motion to compel answer, 488.
 - order denying motion to compel answers, 490.
 - order establishing facts for failure to answer interrogatories, 492.
 - order for default judgment for failure to appear for deposition or to answer interrogatories, 500.
 - order for payment of expenses upon denial of motion to compel answers to interrogatories, 490.

References are to Forms

DEPOSITION AND DISCOVERY—Continued.

- enforcement,
 - oral examination, 486, 487.
 - notice of motion to compel answer, 486.
 - order compelling answers, 487.
 - physical examination, notice of motion to dismiss for refusal to submit to, 494.
 - witness,
 - notice of motion to compel answer on oral examination, 486.
 - notice of motion to compel answers to interrogatories, 488.
 - order compelling answer on oral examination, 487.
 - order compelling answers to interrogatories, 489.
 - order denying motion to compel answers to interrogatories, 490.
- interrogatories, depositions by, 444-452.
 - cross-interrogatories, 450.
 - enlargement of time, 446, 447.
 - notice of motion for, 446.
 - order granting motion for, 447.
 - notice of, 448, 449.
 - direct interrogatories, 445.
 - notice of, 444.
 - objections to taking, 451, 452.
 - motion for, 451.
 - officer related to witness, 451, 452.
 - motion, 451.
 - order for proceedings before different officer, 452.
 - oral examination,
 - motion for, 451.
 - order requiring, 452.
 - order granting motion not to take, 452.
 - recross interrogatories, 450.
 - notice of, 448, 449.
 - redirect interrogatories, 450.
 - notice of, 448, 449.
 - refusal to testify, 488, 489.
 - notice of motion to compel answers to interrogatories, 488.
 - order compelling answers to interrogatories, 489.
- interrogatories to parties to action, 455-463.
 - answers, 462.
 - English practice, 463.
 - contracts, actions on, 455.
 - extension of time to answer, 458, 459.
 - motion for, 458.
 - order for, 459.
 - form of, 455, 457.
 - English practice, 456.
 - objections to, 217, 460.
 - immaterial matters, 217.
 - incompetent matters, 217.
 - irrelevant matters, 217, 460.
 - notice of, 460.
 - opinions, interrogatories calling for, 460.
 - order overruling objections, 461.
 - subsequent events, transactions occurring after suit, interrogatories concerning, 460.
 - unnecessarily burdensome, 217.
 - patent suit, 455.
 - plagiarism, suits for, 455.
 - refusal to answer,
 - default judgment for failure to obey order to answer interrogatories, 499, 500.
 - notice of motion for, 499.
 - order for, 500.
 - establishment of facts,
 - failure to answer interrogatories, order for, 492.
 - notice of motion for failure to answer interrogatories, 491.

References are to Forms

DEPOSITION AND DISCOVERY—Continued.

- interrogatories to parties to action,
 - refusal to answer,
 - expenses, order for payment on denial of motion to compel answers, 490.
 - notice of motion to compel, 488.
 - order compelling answers, 489.
 - order denying motion to compel answers, 490.
 - slander suits, 455.
 - tort actions, 455.
- perpetuation of testimony, 417-423.
 - appeal, 422, 423.
 - motion to perpetuate pending appeal, 422.
 - order to perpetuate pending appeal, 423.
 - motion to perpetuate pending appeal, 422.
 - notice of petition for, 419.
 - order for, 420, 421, 423.
 - petitioner's testimony, 417, 421.
 - order to perpetuate, 421.
 - petition to perpetuate, 417.
 - petitions for, 417, 418.
 - witness testimony,
 - order to perpetuate, 420.
 - petition to perpetuate, 418.
- physical examination,
 - dismissal of action for refusal to submit to, notice of motion, 494.
 - motion for, 471.
 - order for, 472.
 - report, 473, 474.
 - motion for delivery of, 473.
 - order for delivery of, 474.
- property,
 - inspection of, motion for, 466.
 - inspection of, order for, 468.
 - photographs of, 466, 468.
 - motion for, 466.
 - order for, 468.

DIRECTORS,

See CORPORATIONS.

DISMISSAL OF ACTIONS,

See JUDGMENTS; TRIAL OF CIVIL ACTIONS.

DISTRICT COURT RULES,

See RULES OF CIVIL PROCEDURE; DISTRICT COURTS.

DIVERSITY OF CITIZENSHIP,

See ANSWERS AND MOTIONS; COMPLAINTS; REMOVAL OF CAUSES.

DOCUMENTS,

See DEPOSITION AND DISCOVERY; TRIAL OF CIVIL ACTIONS.

issuance of official, allegations of, 122.

DURESS,

See ANSWERS AND MOTIONS.

DYNAMITE,

negligent manufacture and distribution of caps, 102.

E**ELECTION OF REMEDIES,**

defense of, answer, 292.

EMPLOYER'S LIABILITY ACT,

See NEGLIGENCE.

References are to Forms

- EQUITY, BILLS IN,
See RECEIVERS.
- ERROR AND APPEAL,
See APPEALS.
- ESTOPPEL,
See ANSWERS AND MOTIONS.
answer of, 253.
performance prevented by plaintiff, answer, 286.
- EVIDENCE,
See DEPOSITION AND DISCOVERY.
- EXECUTORS AND ADMINISTRATORS,
capacity to sue, allegation of, 120.
death of defendant, suggestion of, 335.
designation, caption, 5.
substitution in pending action, 327-334.
defendant as party,
motion by administrator, 332.
motion by plaintiff, 327.
notice of motion, 328.
order for, 329, 333.
dismissal for failure, order, 334.
plaintiff as party,
motion by executor, 330.
order for, 331.
trusteeship, denial of, 227.

F

- FEDERAL COMMUNICATIONS COMMISSION,
radio station, application for,
appeal from order denying application,
intervention by third party, notice of intention, 969.
notice of, 967.
reasons for, 968.
service of copy of reasons for appeal, acknowledgment of, 968.
intervention on appeal by third party, notice of intention to, 969.
rehearing on,
affidavit of service of notice of petition for, 966.
petition for, 965.
service of notice of petition, affidavit of, 966.
- FEDERAL EMPLOYER'S LIABILITY ACT,
See NEGLIGENCE.
- FEDERAL QUESTIONS,
See COMPLAINTS.
Constitution of the United States, 69.
laws of the United States, 70, 71.
treaties, 72.
- FEDERAL TRADE COMMISSION,
unfair competition,
cease and desist orders, 955.
answer to application for enforcement of, 957.
application for enforcement of, 956.
review of, order allowing, 959.
review of, petition for, 958.
complaint for, 950.
answer to, 951.
notice of, 950.

References are to Forms

FEDERAL TRADE COMMISSION—Continued.

unfair competition,
 complaint for,
 supplemental complaint,
 motion for, 953.
 order for, 954.
 examiner, order appointing, 952.

FELLOW SERVANT, INJURIES BY,

See NEGLIGENCE.

FORECLOSURE OF MORTGAGE,

See MORTGAGES.

FRAUDS,

See CRIMINAL PROCEDURE; FRAUDS, STATUTE OF.

citizenship cancelation for fraud in procurement, 112.
 contract, annulment for, 106.
 contracts procured by, 251, 252.
 answer, 251, 252.
 reliance upon representations, answer, 252.

FRAUDS, STATUTE OF,

administrator, promises by, answer, 267.
 bankruptcy, discharge in, answer, 269.
 debt, default or miscarriage of another, promise to answer for, answer, 273.
 executor, promises by, answer, 267.
 marriage, promise in consideration of, answer, 272.
 real estate, contract concerning, answer, 268.
 sale of goods in violation, answer, 270.
 year, contract not to be performed within, answer, 271.

FRAUDULENT CONVEYANCES,

action to set aside and for debt, 89.
 bankruptcy, suits by trustee, 101.
 debt, joinder with suit to set aside conveyance, 89.
 defendants, addition of,
 motion by defendant, 317.
 order for, 318.

G

GAMBLING,

defenses, answer of, 247.

GENERAL ORDERS IN BANKRUPTCY,

See ORDERS IN BANKRUPTCY.

GOD, ACT OF,

See ACT OF GOD.

GUARDIAN AD LITEM,

application for, 40.
 appointment of, 41, 46.
 capacity to sue, allegation of, 120.
 consent to serve, 45.
 infancy of defendant, answer of, 281.
 notice of hearing on appointment, 44.
 order appointing, 41, 46.
 petition for, 42, 43.

GUARDIAN AND WARD,

See GUARDIAN AD LITEM; NEXT FRIEND; TRUSTEES.

capacity to sue, allegation of, 120.
 designation, caption, 9.
 infancy of defendant, answer, 281.
 liability of ward, answer of infancy, 281.
 substitution in pending action, defendant as party, 336, 337.
 motion of plaintiff, 336.
 order for, 337.
 trusteeship, denial, 229.

References are to Forms

H

HABEAS CORPUS,

- ad prosequendum,
 - order for writ, directed to federal institution, 792.
 - petition for, 791.
 - writ directed to warden of federal institution, 793.
 - writ directed to warden of state institution, 794.
- ad testificandum,
 - petition for, 795.
 - writ directed to warden of state institution, 796.
- convict in prison,
 - answer alleging duly committed, 788.
 - order for writ, 786.
 - petition for, 785.
 - writ of, return of service, 787.
- deportation proceedings,
 - order dismissing writ, 790.
 - petition for, 789.
 - writ of, return of service, 787.
- order for issuance of writ, 786, 792, 798.
- petitions for, 785, 789, 791, 795, 797.
- removal proceedings,
 - order for writ, 798.
 - petition for, 797.

HEARD ACT,

- actions under, 100.
- intervention by subcontractor, 352-354.
 - answer or complaint in, 354.
 - motion for, 352.
 - order for, 353.

HORSES,

- negligent driving, suit for damages, 114.

I

INCOMPETENT PERSONS,

See GUARDIAN AD LITEM; GUARDIAN AND WARD; NEXT FRIEND.

INDIANS,

See CRIMINAL PROCEDURE; INDICTMENTS.

INDICTMENTS,

- abatement, plea in, 751.
 - grand jurors, 751.
 - disqualification of, 751.
 - unauthorized persons present at session, 751.
 - misnomer of defendant, 751.
- bar, pleas in,
 - acquittal, former, 761.
 - conviction, former, 761.
 - jeopardy, former, 762.
 - pardon, 763.
 - statute of limitations, 764.
- conspiracy, 740.
 - fugitive from justice, harboring, aiding, and concealing, 740.
- counterfeiting coins, 736.
- demurrer to indictment,
 - ambiguity, 757.
 - conspiracy, charge of, 758.
 - joinder of offenses, improper, 756-758.
- order sustaining demurrer, 759.
- perjury, charge of, 757.

References are to Forms

INDICTMENTS—Continued.

- demurrer to indictment,
 - public offense, failure to charge, 756-758.
 - uncertainty of charge, 757.
- form of, 729-740.
- Indians, selling intoxicating liquor to, 739.
- internal revenue laws, 731, 732, 735.
 - intoxicating liquor, failure to pay tax, 732, 735.
 - stamp taxes, failure to pay, 731, 732.
- mails, using to defraud, 730.
- naturalization, illegally procuring certificate of, 733.
- perjury, 734.
- quash indictment,
 - motion to, 753.
 - conspiracy, 752.
 - evidence before grand jury, insufficiency of, 753.
 - grand jury, unauthorized person with, 753.
 - joinder of offenses, improper, 752, 754.
 - jurisdiction, lack of, 753.
 - notice of motion, 753.
 - perjury, indictment for, 754.
 - public offense, failure to charge, 753.
 - uncertainty, vagueness and indefiniteness of charge, 753, 754.
 - unconstitutionality of statute under which indictment is brought, 754.
 - order for, jurisdiction, lack of, 755.
- smuggling, 737, 738.
 - goods, wares, or merchandise, 737.
 - opium, 738.

INDIVIDUALS,

See COMPLAINTS.

- depositions, notice of taking, 407-409.
- designation, captions, 1.
- return of service of process upon, 18, 19.
- service of process upon, 18, 19.

INFANTS,

See GUARDIAN AND WARD.

INFORMATION,

See CRIMINAL PROCEDURE.

- contempt, 678.
- form of, 727, 728.

INFRINGEMENTMENT,

See COPYRIGHTS; PATENTS.

INJUNCTIONS,

See RESTRAINING ORDERS.

- Agriculture, Secretary of,
 - cotton quotas, enjoining enforcement of,
 - answer to complaint to enjoin, 1017.
 - complaint for, 1016.
 - intervention by United States, 1018-1020.
 - answer in, 1020.
 - motion for leave, 1018.
 - order granting leave, 1019.
- milk, orders for distribution of, complaint to enjoin violation of orders, 1015.
- certificates of convenience and necessity,
 - motor carriers,
 - answer to complaint to enjoin operation without certificate, 939.
 - complaint to enjoin operation without certificate, 938.
- citizenship, enjoining use of, judgment for, 635.

References are to Forms

INJUNCTIONS—Continued.

- contracts, enjoining violation, 99.
 - judgment, 618.
 - order for, 147(5).
- copyrights, enjoining violation, 93.
 - order for, 147(3).
- covenants, restraining violation, 99.
 - judgment, 618, 619.
 - order, 147(5), 147(6).
- covenants running with the land, violation,
 - judgment, 619.
 - order, 147(6).
- interpleader, suit to prevent other proceedings against plaintiff, 94.
 - judgment upon, 630.
- nuisance, abatement of,
 - judgment, 620.
 - order, 147(7).
- order denying and dismissing complaint, 146, 542.
- patents, enjoining infringement, 92, 116.
 - judgment, 623.
 - order for, 147(1).
- preliminary,
 - motion for, 140.
 - notice of motion for, 141.
 - notice of motion to vacate or modify, 143.
 - order denying, 142, 542.
 - motion to set aside, 145.
 - order for restoration pending appeal, 144.
 - state laws, restraining execution of,
 - judgment denying, 636.
 - order for statutory court of three judges, 525.
- prosecution of another suit,
 - judgment enjoining, 621.
 - order enjoining, 147(8).
- receivers, enjoining interference, 163.
- Securities and Exchange Commission,
 - unregistered securities, sale of,
 - answer to complaint to enjoin, 981.
 - complaint to enjoin, 980.
- state laws, restraining execution of,
 - judgment denying, 636.
 - order for statutory court of three judges, 525.
- trade-mark or trade name, unlawful use, 103.
 - order, 147(2), 147(4).
- ultra vires transaction,
 - judgment enjoining, 622.
 - order enjoining, 147(9).
- violation of, contempt, order denying motion to punish for, 674.

INSURANCE,

- action on policy, admissions, requests for, 480.
- conditions precedent, failure to perform, answer, 265.
- interpleading rights to proceeds, 94.
- intervention in suit against policyholder, motion for, 355.
- limitation of action, failure to bring suit within time allowed by policy, answer, 266.
- war risk insurance, suits for, 110.

INTERNAL REVENUE,

See CRIMINAL PROCEDURE; INDICTMENTS.

INTERPLEADER,

See INTERVENTION; PARTIES TO ACTIONS.

- action to require, 94.
- counterclaim, 222.
- judgment in action of, 630.

References are to Forms

INTERROGATORIES,

See DEPOSITION AND DISCOVERY.

- jury, interrogatories to,
 - special verdict, 565.
- special verdict,
 - answers to interrogatories, 565.
 - instruction to answer, 564.

INTERSTATE COMMERCE COMMISSION,

- motor carriers,
 - certificate of convenience and necessity,
 - answer to complaint to set aside order denying certificate, 937.
 - complaint to set aside order denying certificate, 936.
 - injunction, 938, 939.
 - answer to complaint to enjoin operation without certificate, 939.
 - complaint to enjoin operation without certificate, 938.
 - order denying, 935.
 - railroads, leasing properties of,
 - answer of United States to complaint to set aside order of commission, 941.
 - complaint to set aside order of commission concerning, 940.

INTERVENTION,

See ANSWERS AND MOTIONS; PARTIES TO ACTIONS.

- answers of interveners, 351, 354, 368, 1020.
- constitutionality, statute in issue,
 - Agricultural Adjustment Act,
 - answer of United States in intervention, 1020.
 - motion of United States to intervene, 1018.
 - order permitting United States to intervene, 1019.
 - answer of United States as intervener, 368, 1020.
 - certification of notice to Attorney General, 361, 364.
 - motion of United States to intervene, 367, 1018.
 - notice to Attorney General, 360, 362, 364, 365.
 - order for notice to Attorney General, 363, 366.
 - order permitting United States to intervene, 360, 369, 1019.
- corporations, motion of stockholders to intervene in stockholders representative suit against corporation, 358.
- cotton quotas, orders for, enjoining enforcement of,
 - answer of United States in intervention, 1020.
 - motion of United States to intervene, 1018.
 - order granting United States leave, 1019.
- Heard Act,
 - complaint of subcontractor as intervener, 354.
 - motion by subcontractor, 352.
 - order granting subcontractor leave to intervene, 353.
- insurer of defendant, motion to intervene as of right, 355.
- lien holder, motion to intervene in mortgage foreclosure, 357.
- motions for, 350, 352, 355-358, 367, 1018.
- National Labor Relations Board, labor union, intervention on appeal, 1002, 1003.
 - order granting leave, 1003.
 - petition for leave, 1002.
- orders for, 353, 359, 360, 369, 1019.
- patents, suits for infringement, manufacturer and vendor,
 - answer as intervener, 351.
 - motion to intervene, 350.
- quieting title, motion of adverse claimant to intervene, 365.
- radio station, denial of application for, intervention by third party on appeal, notice of intention, 969.
- validity of award of federal agency in issue, order for notice to Attorney General, 363.

INTOXICATING LIQUORS,

See CRIMINAL PROCEDURE; INDICTMENTS.

References are to Forms

J

JUDGMENTS,

See DECLARATORY JUDGMENTS; INJUNCTIONS; ORDERS; RESTRAINING ORDERS.

- accounting, 623, 629.
 - partnerships, judgment for, 629.
 - patent suits, judgment for, 623.
- amendment or correction,
 - finding of facts and conclusions of law, 573, 574.
 - notice of motion to amend, 573.
 - order amending, 574.
 - motion to correct judgment, 661.
 - order correcting judgment, 662.
- Circuit Court of Appeals, mandate of,
 - order of district court in compliance with, 716.
 - order staying, 714.
 - remanding cause, 715.
- contempt, civil,
 - deposition, refusal to answer or be sworn, judgment and sentence, 671, 677.
 - injunction, violation of, judgment denying motion to punish for, 674.
- contempt, criminal, restraining order, violation of, judgment and sentence, 680.
- costs,
 - judgment for, 631, 633.
 - notice of taxation of, 637.
 - review of taxation, 638, 639.
 - motion for, 638.
 - order for, 639.
- Court of Claims, judgment against United States, 907.
- criminal cases, 680, 769.
 - commitment, 769.
- declaratory judgments,
 - patent suits, 628.
 - infringement,
 - denial of, judgment, 628.
 - judgment of, 628.
 - letters patent, judgment of invalidity, 628.
 - promissory note, judgment of validity, 627.
- default by clerk,
 - failure to plead or appear,
 - entry of default,
 - affidavit for, 640.
 - order for, 641.
 - judgment by default, 643.
 - affidavit for, 642.
 - setting aside default, 646, 647.
 - notice of motion for, 646.
 - order for, 647.
- default by court,
 - deposition and discovery,
 - refusal to testify, notice of motion for, 499.
 - refusal to testify, order for, 500.
 - failure to answer interrogatories,
 - judgment by default, 645.
 - notice of application for, 644.
- defendants,
 - judgment for, upon motion, 632.
 - verdict of jury, judgment upon, 616.
- dismissal, judgment of, 610.
 - amount in controversy less than \$3,000,
 - motion for, 218, 220.
 - notice of motion, 218.
 - cause of action, failure to allege, 610.
 - motion for, 218, 541.
 - notice of motion, 218.
 - order for, 219, 383.

References are to Forms

JUDGMENTS—Continued.

- dismissal, judgment of,
 - cause under constitution as laws of United States, failure to allege, judgment of, 636.
 - motion for, 218, 541.
 - notice of motion, 218.
- class action,
 - notice of motion for leave to dismiss, 533.
 - notice of proposed, dismissal, 531.
 - order for, 534
 - order for service of notice of proposed dismissal, 532.
- diversity of citizenship, failure of, motion for, 220.
- injunction, preliminary, order for, 146, 542.
- jurisdiction, failure of, 610.
 - motion for, 218, 220.
 - notice of motion, 218.
- physical examination, notice of motion to dismiss for refusal to submit to, 494.
- pretrial conference, 539, 540.
 - notice of motion to dismiss for failure to appear at, 539.
 - order of dismissal for failure to appear at, 540.
- process, insufficiency of,
 - motion for, 218, 220.
 - notice of motion, 218.
- prosecution, want of, 610.
 - notice of motion, 537, 539.
 - order for, 538, 540.
- venue, failure of, 610.
 - motion for, 220.
- voluntary, 535.
 - costs, motion to require payment of, 543.
 - costs, order requiring payment of, 544.
 - notice of motion, 530.
 - before service of answer, 528.
 - leave to dismiss class action, 533.
 - notice of proposed dismissal of class action, 531.
 - order denying motion to dismiss after service of answer, 536.
 - order dismissing class action, 534.
 - order for dismissal after service of answer, 535.
 - order for service of notice of proposed dismissal of class action, 532.
 - stipulation of, 529.
- dissolution of partnership, judgment for, 629.
- entry, allegation of, 123.
- finding of facts and conclusions of law, 572.
 - amendment of, 573, 574.
 - notice of motion for, 573.
 - order for, 574.
- judgment upon, 617, 907.
- guilty, plea of, judgment upon, 769.
- injunctions,
 - citizenship, judgment cancelling and enjoining use of, 635.
 - contract for services, enjoining violation of, 618.
 - interpleader to determine right to corporate dividends, judgment upon, 630.
 - nuisance, abatement of, 620.
 - patents, infringement of, 623.
 - prosecution of suit, 621.
 - real estate, use of, enjoining violation of covenant concerning, 619.
 - statutory three judge court, judgment of, 636.
 - ultra vires transactions, 622.
- interpleader, judgment in action for, 630.
- money, judgment for recovery of, 631, 633.
 - District of Columbia form, 633.
- National Labor Relations Board, rendition of allegation, 123.

References are to Forms

JUDGMENTS—Continued.

- partial judgment, 634.
- pleadings, judgment on, 654-656.
 - hearing on motion for, judgment after, 656.
 - notice of motion for, 651, 652.
 - order denying motion for, 653.
 - order for, 654.
 - order granting motion, judgment on, 655.
- quieting title, judgment for, 625.
- reference to special master,
 - partnerships, accounting and dissolution of, 629.
 - patent suits, 623.
- rendition of, allegation of, 123.
- res judicata, answer of, 260.
- setting aside verdict and judgment,
 - motion to set aside and for judgment, 566.
 - order denying motion to set aside and for judgment, 570.
 - order setting aside and directing judgment, 569.
- specific performance, judgment directing, 624.
- statutory three judge court, judgment of, 636.
- summary judgment, 650.
 - notice of motion for, 648.
 - order for, 649.
- taxes,
 - Board of Tax Appeals, judgment of no deficiency, 917.
 - Circuit Court of Appeals, judgment affirming judgment of Board of Tax Appeals, 924.
- trust, impression upon property, judgment for, 626.
- United States, judgment against, 907.
- verdict, directed,
 - judgment upon, 613, 614, 616.
 - motion for judgment of, 566.
 - notice of motion for judgment, 571.
 - order directing judgment upon, 567, 569.
- verdict of jury,
 - criminal cases, 680, 769.
 - judgment upon, 611, 612, 616.
 - several defendants, judgment upon, 616.
 - special verdict, judgment upon, 615.

JURISDICTION,

- amount in controversy, complaint, 59-70.
- colorable assignment for federal jurisdictional purposes, answer of, 284.
- Constitution of United States, complaint, 69.
- diversity of citizenship, complaint, 59-68.
- federal question, complaint, 69-72.
- laws of United States, complaint, 70, 71.
- objections to,
 - motion, 218, 220.
 - notice of motion, 218.
- parties, allegation of omission because of, 124.
- treaties of the United States, complaint, 72.
- Tucker Act, suits under, complaint, 75.
- United States,
 - suits by, 73.
 - suits by officer of, 74.

JURY TRIAL,

See TRIAL OF CIVIL ACTIONS.

L

LABOR AND MATERIALS,

See SUBCONTRACTORS.

LACHES,

- answer of, 256.

References are to Form.

LAND,

See REAL ESTATE.

LIBEL,

employment, allegation of loss, 125.
 privilege of libel, answer, 290.
 truth of libel, answer of, 289.

LIFE INSURANCE,

See INSURANCE.

LIMITATION OF ACTIONS,

answer of, 221, 293.
 contract, time limited by, answer, 266.

LORD CAMPBELL'S ACT,

See WRONGFUL DEATH.

M

MAILS,

See CRIMINAL PROCEDURE.

MAINTENANCE OR CHAMPERTY,

answer of, 283.

MASTER AND SERVANT,

See NATIONAL LABOR RELATIONS BOARD; NEGLIGENCE.

MASTERS,

compensation, order allowing, 602.
 equity suits, reference of suits arising prior to new rules to master in chancery,
 589.
 general reference,
 notice of motion for, 580.
 order for, 581-583.
 stipulation of reference, 588.
 hearing, continuance, 592, 593.
 notice of motion for, 592.
 order for, 593.
 place and time, notice, 591.
 oath, 590.
 report, 595.
 accounting matters, 597.
 adoption, notice of motion to, 601.
 objections to, 598.
 order overruling objections, 600.
 order sustaining objections, 599.
 submission of draft to counsel, 594.
 specific issues, reference,
 accounting for partnership assets, order of reference, 629.
 interlocutory judgment for accounting,
 commissions earned, order of reference, 586.
 damages for patent infringement, order of reference, 587, 623.
 order for, 584-587, 589, 623, 629.
 process, motion to quash, order of reference, 585.
 report of master, 596, 597.

MERCHANT MARINE ACT,

See NEGLIGENCE.

MILK,

See SECRETARY OF AGRICULTURE.

MISTAKE,

contract, rescission of, 107.
 money paid by, 82.

References are to Forms

MONEY,

- judgment for, 633, 634.
 - District of Columbia form, 633.
 - partial recovery, 634.
- mistake, paid by, 82.

MORTGAGES,

- foreclosure,
 - lienor, as additional party defendant, motion for, 323.
 - mortgage a conveyance, 97.
 - mortgage a lien, 97.
- receivers,
 - motion for appointment, 161.
 - order appointing, 165.
 - rents, order of appointment for collection, 165.
- redemption by trustee in bankruptcy, 856, 857.
 - order authorizing, 857.
 - petition for authority, 856.
- trustee, capacity to sue, allegation of, 120.

MOTIONS,

See ANSWERS AND MOTIONS.

MOTOR VEHICLES,

See INTERSTATE COMMERCE COMMISSION.

- negligent operation, suit against owner, 104, 115.
 - interrogatories to parties, 455.
- wrongful death, Lord Campbell's Act, 115.

MUNICIPAL CORPORATIONS,

See CORPORATIONS.

N

NATIONAL LABOR RELATIONS BOARD,

- answer to complaint, 993.
 - extension of time for, order, 992.
- charge before board, 990.
- complaints, 991.
- hearing,
 - notice of, 995.
 - postponement, notice of, 996.
- order and decision of board, 999.
 - enforcement, petition for, 1001.
 - rendition, allegation of, 123.
- review of board's action,
 - intervention by another labor union,
 - order granting leave to intervene, 1003.
 - petition for leave, 1002.
 - judgment of Circuit Court of Appeals, 1005.
 - petition for, 1000.
 - rehearing, petition for, 1004.
- trial examiner,
 - designation, order, 994.
 - exceptions to intermediate report, 998.
 - report of, intermediate, 997.

NATURALIZATION,

See CITIZENS.

NE EXEAT,

- affidavit in support of motion for, 181.
- motion for, 180.
- order for writ, 182.
- writ, 183.

References are to Forms

NEGLIGENCE,

- actions for, 85, 86, 90, 91, 102, 104, 114, 115.
 - interrogatories to parties, 455.
- assumption of risk, answer of, 240.
- contributory, 243, 244.
- dynamite caps, negligent manufacture and distribution, 102.
- Employer's Liability Act, 90.
- fellow servant, injuries by, 248.
- horses, negligent driving, 114.
- joint and several actions, 86.
- Lord Campbell's Act, suits under, 115.
- Merchant Marine Act, 91.
- motor vehicles,
 - suit against owner, 104, 114.
 - interrogatories to parties, 455.
 - wrongful death, 115.
- plaintiff, negligence on part of, 243, 244.
- seamen, injuries to, 91.
- wilfulness, recklessness, or negligence, allegations of, 86.

NEW TRIAL, MOTION FOR,

- civil cases,
 - evidence,
 - erroneous exclusion of, 657.
 - erroneous introduction of, 657.
 - insufficient to sustain verdict, 657.
 - newly discovered, 658.
 - instructions,
 - giving erroneous, 657.
 - refusal of, 657.
 - issues, error in submitting to jury, 657.
 - misconduct of juror, 657.
 - notice of motion for, 566, 657, 658.
 - order for, 568, 659.
 - order overruling motion, 660.
 - verdict,
 - contrary to law, 657.
 - erroneous direction of, 657.
 - excessiveness, 657.
 - not sustained by evidence, 657.
 - verdict directed,
 - erroneous instruction, 657.
 - erroneous refusal, 657.
- criminal cases, 766, 767.
 - demurrer to indictment, overruling, 766.
 - directed verdict, refusal of, 766.
 - evidence, 766, 767.
 - erroneous admission of, 766.
 - erroneous exclusion of, 766.
 - newly discovered, 767.
 - instructions,
 - error in giving, 766.
 - refusal of, 766.
 - jury,
 - bailiff in charge of not sworn, 766.
 - communications from outside sources, 766.
 - disqualification of juror, 766.
 - overruling challenge to juror, 766.
 - permitting separation of, 766.
 - misconduct of counsel, denial of motion for mistrial, 766.
 - notice of motion, 766.
 - order granting motion, 768.
 - quash indictment, overruling motion to, 766.
 - verdict, refusal to direct, 766.

References are to Forms

NEXT FRIEND,

See GUARDIAN AD LITEM; GUARDIAN AND WARD.
capacity to sue, allegation of, 120.
designation, caption, 8.

NOTES,

See PROMISSORY NOTES.

NOVATION,

mutual exchange of credits, answer, 264.
note given, answer, 263.

NUISANCE,

judgment, enjoining or sustaining, 620.
order enjoining or restraining, 147(7).

O

OFFICERS,

actions by, 74.
return of service of process upon, 22.
service of process upon, 22.
successor, substitution in pending action, defendant, as party,
motion by plaintiff, 340.
order for, 341.

OFFICIAL ACTS AND DOCUMENTS,

issuance or performance, allegations of, 122.
judgment or order, allegation of rendition, 123.

OPIUM, SMUGGLING,

See CRIMINAL PROCEDURE; INDICTMENTS.

ORDERS,

See INJUNCTIONS; JUDGMENTS; ORDERS IN BANKRUPTCY; RESTRAINING ORDERS.

National Labor Relations Board, rendition, allegations of, 123.
poor persons, permitting to prosecute or defend, 56.

ORDERS IN BANKRUPTCY,

accountants, employment authorized, No. 45, p. 581.
accounts,
marshal's expenses, No. 19, p. 576.
referee, No. 26, p. 577.
trustee, referred to referee for audit, No. 17, p. 575.
amendments, petition and schedules, form, No. 11, p. 574.
ancillary receivers, application for, No. 51, p. 585.
appeals, rules governing, No. 36, p. 579.
appraisers, employment, compensation, No. 45, p. 581.
arbitration, No. 33, p. 579.
attorneys, allowance of compensation, Nos. 42, 43, p. 580.
appointed on order of court, No. 44, p. 580.
collusion with debtor, no fees allowed, No. 43, p. 580.
auctioneers, employment, compensation, No. 45, p. 581.
bankrupt, articles set off to him by trustee, No. 17, p. 575.
bond, depository, No. 53, p. 586.
chapter X, proceedings under, No. 52, p. 585.
chapter XI, proceedings under, No. 48, p. 581.
chapter XII, proceedings under, No. 54, p. 587.
chapter XIII, proceedings under, No. 55, p. 587.
claims,
assignment, proof, No. 21, p. 576.
contingent liability, No. 21, p. 576.
list of proved claims and interest, No. 24, p. 577.
power of attorney to represent creditor, No. 21, p. 576.
proof, No. 21, p. 576.
reconsideration, No. 21, p. 576,

References are to Forms

ORDERS IN BANKRUPTCY—Continued.

- clerks, compensation, No. 35, p. 579.
- compensation,
 - attorneys, No. 42, p. 580.
 - clerks, referees, receivers, and trustees, No. 35, p. 579
- compounding of claims, No. 28, p. 578.
- compromise, No. 33, p. 579.
- costs, contested proceedings, No. 34, p. 579.
- courts of bankruptcy, rules, No. 56, p. 587.
- creditors,
 - conduct of proceedings, No. 4, p. 573.
 - examination in proof of claim, No. 21, p. 576.
 - list in involuntary bankruptcy, No. 9, p. 574.
 - representation by receivers or attorneys, No. 39, p. 580
 - special meeting, No. 25, p. 577.
- custodian of property, No. 40, p. 580.
- debtor, imprisonment, No. 30, p. 578.
- depository,
 - bond, No. 53, p. 586.
 - designated by referee, No. 26, p. 577.
 - withdrawal of funds, No. 29, p. 578.
- discharge,
 - opposition, No. 32, p. 579.
 - petition for, No. 31, p. 579.
- docket, No. 1, p. 573.
- duties,
 - referee, No. 12, p. 574.
 - trustee, No. 17, p. 575.
- expenses, indemnity for, No. 10, p. 574.
- fees, clerk, No. 35, p. 579.
- filing papers after reference, No. 20, p. 576.
- filing papers, indorsement, No. 2, p. 573.
- financial statement, referee, No. 26, p. 577.
- forms used, No. 38, p. 580.
- imprisonment of debtor, No. 30, p. 578.
- indemnity for expenses, No. 10, p. 574.
- inventory by trustee, No. 17, p. 575.
- involuntary, list of creditors, No. 9, p. 574.
- jurisdiction, petitions filed in different courts, No. 6, p. 574.
- marshal,
 - custodian of property, No. 40, p. 580.
 - expense, No. 19, p. 576.
- masters, reports, No. 47, p. 581.
- notice, appointment of trustee, No. 16, p. 575.
- official or general trustee not appointed, No. 14, p. 575.
- open account, proof of claim, No. 21, p. 576.
- opposition, costs, No. 34, p. 579.
- opposition to discharge, No. 32, p. 579.
- papers filed, indorsement, No. 2, p. 573.
- payment of moneys deposited, No. 29, p. 578.
- petition,
 - discharge, No. 31, p. 579.
 - filed in different courts, No. 6, p. 574.
 - form, title, No. 5, p. 573.
 - priority, No. 7, p. 574.
- power of attorney, representing creditor, No. 21, p. 576.
- proceedings under, conduct, No. 4, p. 573.
 - chapter X, No. 52, p. 585.
 - chapter XI, No. 48, p. 581.
 - chapter XII, No. 54, p. 587.
 - chapter XIII, No. 55, p. 587.
 - section 75, No. 50, p. 583.
 - section 77, No. 49, p. 581.
- process, issuance and test, No. 3, p. 573.
- proofs of claim, No. 21, p. 576.

References are to Forms

ORDERS IN BANKRUPTCY—Continued.

- receivers,
 - compensation, No. 35, p. 579.
 - custodian of property, No. 40, p. 580.
- reconsideration of claim, No. 21, p. 576.
- redemption of property, No. 28, p. 578.
- referee,
 - accounts kept, No. 26, p. 577.
 - compensation, No. 35, p. 579.
 - duties, No. 12, p. 574.
 - orders, No. 23, p. 577.
- reports of referees and special masters, No. 47, p. 581.
- rules, courts of bankruptcy, Nos. 37, 56, pp. 579, 587.
- sale of property, No. 18, p. 575.
- subpoenas, issuance and test, No. 3, p. 573.
- summons, issuance and test, No. 3, p. 573.
- testimony, taking of, No. 22, p. 577.
- trustees,
 - compensation, No. 35, p. 579.
 - duties, No. 17, p. 575.
 - no official or general trustee appointed, No. 14, p. 575.
 - notice of appointment, No. 16, p. 575.
 - removal for failure to file report, No. 17, p. 575.
 - unnecessary if no assets, No. 15, p. 575.
- waiver of right to share in payments, No. 41, p. 580.
- witnesses, examination of, No. 22, p. 577.

P

PARTIES TO ACTION,

See CAPACITY TO SUE; CAPTIONS; DEPOSITION AND DISCOVERY.

- additional defendants,
 - defendant's motion to summon, 317, 319, 320.
 - fraudulent conveyance, addition of grantee as party defendant, motion for, 317.
 - joint obligator, motion by defendant to require plaintiff to summon additional defendants, 320.
 - mortgage foreclosures, addition of other lienor, motion for, 323.
 - order granting defendant's motion, 316, 318.
 - order granting plaintiff's motion, 321, 324.
 - patent infringement,
 - addition of successor to defendant, motion for, 319.
 - motion for, 319, 322.
 - plaintiff's motion, 315, 322, 323.
 - principal in suits against agent, motion for, 315, 322.
- administrators,
 - capacity to sue, allegation of, 120.
 - captions, 5.
 - denial of appointment, answer, 227.
 - substitution as party defendant,
 - motion of administrator, 332.
 - motion of plaintiff, 327.
 - notice of motion, 328.
 - order for, 329, 333.
- associations,
 - captions, 3.
 - denial of capacity to sue, answer, 230.
- corporations,
 - captions, 4.
 - denial of existence, answer, 225.
- death of defendant, suggestion of, 335.
- executors,
 - capacity to sue, allegation of, 120.
 - captions, 5.

References are to Forms

PARTIES TO ACTION—Continued.

- executors,
 - denial of appointment, 227.
 - substitution as party plaintiff, 330, 331.
 - motion by executor, 330.
 - order for, 331.
- guardians,
 - capacity to sue, allegation of, 120.
 - captions, 9.
 - denial of appointment, answer, 229.
- interpleader,
 - action to require, 94.
 - counterclaim as, 222.
- intervention,
 - constitutionality of statute in issue,
 - answer of United States as intervener, 368, 1020.
 - certification of notice to Attorney General, 361, 364.
 - motion of United States to intervene, 367, 1018.
 - notice to Attorney General, 360, 362, 364, 365.
 - order for notice to Attorney General, 363, 366.
 - order permitting United States to intervene, 360, 369, 1019.
 - Heard Act,
 - complaint of subcontractor as intervener, 354.
 - motion by subcontractor, 352.
 - order granting subcontractor leave to intervene, 353.
 - insurer of defendant, motion to intervene as matter of right, 355.
 - labor union on appeal from order of National Labor Relations Board,
 - decree granting leave to intervene, 1003.
 - petition for leave, 1002.
 - lien holder, motion to intervene in mortgage foreclosure suit, 357.
 - order for, 353, 359, 360, 369, 1019.
 - patents, suits for infringement, manufacturer and vendor of defendant,
 - 350, 351.
 - answer as intervener, 351.
 - motion to intervene, 350.
 - quieting title, motion of adverse claimant to intervene, 356.
 - radio station, denial of application for, appeal, intervention by third party, notice of intent, 969.
 - stockholders' representative suit against corporation, motion of other stockholders to intervene, 358.
 - validity of award of federal agency in issue, order for notice to Attorney General, 363.
- joint obligor, omission, answer, 221.
- misjoinder,
 - motion of defendant to be dropped, 325.
 - order granting motion to drop defendant on grounds of, 326.
- officers, capacity to be sued, allegation, 74.
- omission, allegations of complaint, 124.
- partners,
 - captions, 2.
 - denial of relationship, answer, 228.
- receivers,
 - capacity to sue, allegation of, 120.
 - denial of capacity to be sued, answer, 231.
- substitution of parties, 327-341.
 - deceased persons,
 - administrator as party defendant,
 - motion by administrator, 332.
 - motion by plaintiff, 327.
 - notice of motion, 328.
 - order for, 329, 333.
 - dismissal for failure to substitute, order, 334
 - executor as party plaintiff,
 - motion for, 330.
 - order for, 331.

References are to Forms

PARTIES TO ACTION—Continued.

- substitution of parties,
 - grantee of real estate subsequent to suit, as party defendant,
 - motion by plaintiff, 338.
 - order for, 339.
 - incompetent person, substitution of guardian as party defendant,
 - motion by plaintiff, 336.
 - order for, 337.
 - notice of motion, 328.
 - officers, successor officer as party defendant,
 - motion by plaintiff, 340.
 - order for, 341.
 - transferee of interest as party defendant,
 - motion by plaintiff, 338.
 - order for, 339.
- third party practice, 300-305.
 - complaint against, 305.
 - motion to bring in third party, 300.
 - order denying leave to bring in third party, 302.
 - order granting leave to bring in third party, 301, 303.
 - summons for third party, 304.
- trustees,
 - capacity to sue, allegation, 120.
 - captions, 5-7, 9.
- United States,
 - actions against, 75, 96, 110.
 - Tucker Act, 75, 96.
 - war risk insurance, 110.
 - actions in name of, allegations, 73.

PARTNERS,

- accounting,
 - judgment for, 629.
 - master, special, reference to, 629.
- bankruptcy,
 - claim in, proof by, 849.
 - petition in, 808.
- designation, caption, 2.
- dissolution of partnership, judgment of, 629.
- diversity of citizenship, suits by or against, 65, 66.
- existence, denial, 228.
- return of service of process upon, 20.
- service of process upon, 20.

PATENTS,

- determination of rights, declaratory judgment, 95.
 - judgment upon, 628.
- infringement, suit for, 92, 116, 902.
 - accounting for damages, reference to special master, order for, 587, 623.
 - additional defendants,
 - motion by defendant, 319.
 - motion by plaintiff, 322.
 - order for, 324.
 - injunction, 92, 116.
 - judgment for, 623.
 - orders, 147(1).
 - interrogatories to parties, 455.
 - intervention, manufacturer and vendor of defendant,
 - answer of prior patent, 351.
 - motion of, 350.
 - judgment upon, 587, 623.
 - license to use, answer, 257.
 - prior patent, answer of, 351.
 - United States, petition against, 902.

PAUPERS,

See POOR PERSONS.

References are to Forms

PAYMENT,

See ACCORD AND SATISFACTION.

- answer of, 258.
- check on bank becoming insolvent, 274.
- exchange of credits, answer of, 264.
- extension of time, answer of, 262.
- liability limited by contract, answer of, 275.
- note in payment, answer of, 263.
- novation, 263, 264.
- release, answer of, 259.
- tender, 279.

PERJURY,

See CRIMINAL PROCEDURE.

PERPETUATION OF TESTIMONY,

- appeal, motion for perpetuation pending appeal, 422.
- notice of petition, 419.
- order for perpetuation of petitioner's testimony, 421.
- order for perpetuation of witness's testimony, 420.
- order for perpetuation pending appeal, 423.
- petition to perpetuate petitioner's testimony, 417.
- petition to perpetuate witness's testimony, 418.

PHOTOGRAPHS,

See DEPOSITION AND DISCOVERY.

PHYSICAL EXAMINATION,

See DEPOSITION AND DISCOVERY.

PLAGIARISM,

- interrogatories to parties, 455.

PLAINTIFFS,

See PARTIES TO ACTIONS.

PLEADINGS,

See AMENDED AND SUPPLEMENTAL PLEADINGS; ANSWERS AND MOTIONS; CAPTIONS;
COMPLAINTS; CRIMINAL PROCEDURE; PARTIES TO ACTIONS.

PLEAS,

See CRIMINAL PROCEDURE.

POOR PERSONS,

- application to proceed as, 55.
- order granting permission to proceed as, 56.

PRETRIAL PROCEDURE,

See DEPOSITION AND DISCOVERY.

- contract action, order, 397.
- failure to appear,
 - dismissal of action, notice of motion for, 539.
 - dismissal of action, order for, 540.
- notice of conference, 395.
- order on pretrial conference, 398.
- tort action, order, 396.

PROCESS,

See PARTIES TO ACTIONS; SUBPOENAS.

- arrest, civil,
 - attachment, writ of, 676.
 - contempt, failure to appear and show cause,
 - order for writ of attachment, 675.
 - writ of attachment, 676.
- deposition and discovery,
 - refusal to testify, notice of motion for order of arrest, 495.
- ne exeat, 180-183.

References are to Forms

PROCESS—Continued.

- arrest, criminal,
 - bench warrant, 743.
 - capias, return of service of, 744.
 - warrants, 726, 742-744.
- bankruptcy, subpoena to bankrupt, 810.
- guardian ad litem, notice of hearing for appointment, 44.
- ne exeat,
 - affidavit in support of motion, 181.
 - motion for, 180.
 - order for, 182.
 - writ of, 183.
- publication of notice, 30-33.
 - affidavit for service, 31.
 - motion for service, 30.
 - order for service, 32.
 - proof of publication, 33.
- removal of prisoner, warrant for, 742.
 - application for, 741.
- summons, 15, 304.
 - insufficiency of service or return,
 - motion to dismiss or quash, 218, 220.
 - notice of motion to dismiss or quash, 218.
 - reference of issue to special master, order for, 585.
 - return by marshal, 18.
 - return by special appointee, affidavit of service, 19-24, 28, 29.
 - absent defendant, 28.
 - agency of United States, 22, 23.
 - associations, 20.
 - corporation, 20, 23, 24.
 - individual, 19.
 - municipal corporation, 24.
 - officer of United States, 22.
 - partnerships, 20.
 - possessor of property of absent defendant, 29.
 - United States, 21.
 - service,
 - absent defendant,
 - affidavit for order, 26.
 - motion for order, 25.
 - order for, 27.
 - special appointment, motion for, 16.
 - special appointment, order for, 17.
 - third party, 304.
 - ex parte order granting leave to serve, 303.
 - motion to serve, 300.
 - order denying leave to serve, 302.
 - order granting leave to serve, 301, 303.

PROMISSORY NOTES,

- actions upon, 78, 113.
- declaratory judgment to determine validity, judgment upon, 627.
- extension of time, answer, 262.
- surety release of, answer, 277.

PUBLICATION OF NOTICE,

See PROCESS.

R

REAL ESTATE,

See MORTGAGES.

- adverse possession, answer of, 287.
- covenants running with the land,
 - judgment enjoining violation, 619.
 - order restraining violation, 147(6).

References are to Forms

REAL ESTATE—Continued.

- fraudulent conveyance, suit to set aside, 89.
- inspection of,
 - motion for, 466.
 - order for, 468.
- mortgages,
 - foreclosure to add lienors, motion, 323.
 - motion for appointment of receiver, 161.
- photographs of,
 - motion for, 466.
 - order for, 468.
- quiet title,
 - grantee subsequent to suit, addition as party defendant.
 - motion by plaintiff, 338.
 - order for, 339.
 - judgment for removal of cloud on title, 625.
- rents,
 - order appointing receiver to collect, 165.
 - suit for, 117.
- specific performance of contract to convey, 88.
- judgment, 624.

RECEIVERS,

See BANKRUPTCY.

- account, allowance, 170.
- appointment,
 - motion for, 161.
 - notice of motion for, 160.
 - order for, 162-165.
 - adversary proceedings, 164.
 - corporations, 163.
 - ex parte proceedings, 162.
 - real estate, collection of rents, 165.
- attorneys,
 - motion for appointment, 166.
 - order for, 167.
- bond, orders for, 163-165.
- capacity to be sued, denial, 231.
- capacity to sue, allegation of, 120.
- compensation, allowance of, 108.
 - attorneys for plaintiff, 168.
 - attorneys for receiver, 168.
- discharge, 169, 170.
 - motion for, 169.
 - order for, 170.
- fees, allowance of, 168.
- mortgaged property, motion for, 161.

RECKLESSNESS,

See NEGLIGENCE.

RELEASE,

See ARBITRATION AND AWARD.

- answer of, 259.
- bond, alteration of contract, answer of surety, 291.
- note, alteration of contract, answer of surety, 277.

REMOVAL OF CAUSES,

- amount in controversy, 191.
- bond, 193.
 - approval, order, 192.
- diversity of citizenship, 191.
- notice of petition for, 190.
- order for, 192.

References are to Forms

REMOVAL OF CAUSES—Continued.

- remanding,
 - denial of motion, order, 196.
 - granting motion, order, 197.
 - motion, 194.
 - notice of motion, 195.

RENT,

- action for, 117.

RES JUDICATA,

- defense of, answer, 260.
- election of remedies, answer, 292.

RESTRAINING ORDERS,

See COMPLAINTS; INJUNCTIONS.

- bond for, 138.
- bond, order for, 135-137.
- complaints for,
 - copyrights, restraining violation, 93.
 - covenants, restraining violation, 99.
 - patents, restraining violation, 92, 116.
 - trade-name, illegal use, unfair competition, 103.
- copyright infringement, 147(3).
- covenants, negative, 147(5), 147(6).
- covenants running with the land, 147(6).
- hearing, order for, 135.
- nuisance, 147(7).
- order or rule to show cause why preliminary injunction should not be granted, 136, 137.
- patent infringement, 147(1).
- prosecution of another action, 147(8).
- state laws, restraining execution of, order for statutory court of three judges, 525.
- temporary orders, 135-137, 139.
- trade-mark infringement, 147(2).
- ultra vires transactions, 147(9).
- unfair competition, 147(4).
- violation of,
 - information for contempt, 678.
 - judgment and sentence for contempt, 680.
 - petition to punish for contempt, 679.

RETURN OF PROCESS,

See PROCESS.

REVIEW,

See APPEALS.

RULES OF CIVIL PROCEDURE, DISTRICT COURTS,

- admiralty, rules not applicable to, p. 938.
- admissions on request, p. 919.
 - effect of admissions, p. 919.
 - request for, p. 919.
 - response, p. 919.
 - wrongful denial, expenses charged, p. 920.
- adoption proceedings, rules not applicable, p. 938.
- amendments,
 - conforming to evidence, p. 909.
 - continuance because of, p. 909.
 - counterclaim added, p. 908.
 - matters occurring since date of pleading, p. 909.
 - pre-trial conferences, p. 909.
 - relation back, p. 909.
 - right in general, p. 909.
 - third party practice, p. 908.
 - time for responding to, p. 909.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- ancillary remedies, p. 932.
- answer, p. 904.
 - contents, pp. 904, 905.
 - filing, p. 903.
 - intervener's answer, copy served, p. 912.
 - mistake in designation as defense or counterclaim, p. 906.
 - removed actions, p. 939.
 - service on plaintiff, p. 903.
 - time for serving, p. 906.
- appeals to Circuit Court of Appeals, p. 934.
 - bond on appeal, pp. 934, 935.
 - docketing, time for, p. 935.
 - how taken, p. 934.
 - joint or several appeals, p. 935.
 - motion to correct judgment, effect, p. 930.
 - notice of appeal, p. 934.
 - receiverships, p. 933.
 - record on appeal, pp. 935, 936.
 - agreed statement, p. 937.
 - correcting or supplementing, p. 936.
 - designation of contents, pp. 903, 935.
 - form of testimony, p. 935.
 - necessary matters, p. 936.
 - omission of unnecessary matter, p. 936.
 - original papers transmitted to reviewing court, p. 936.
 - preliminary hearing in reviewing court, record for, p. 936.
 - printing the record, p. 936.
 - reporter's transcript, p. 935.
 - several appeals from same judgment, p. 936.
 - stipulation as to contents, p. 936.
 - time for filing, p. 934.
 - transmitted by clerk to reviewing court, p. 936.
 - what constitutes, p. 935.
 - statement of points, when required, p. 936.
 - supersedeas bond and stay of proceedings, pp. 931, 934, 935.
- appeals to Supreme Court, pp. 934, 935.
 - how taken to, p. 934.
 - joint or several appeals, p. 935.
- appearance, filing and service, p. 903.
- applicability of rules, pp. 938, 940.
- arbitration proceedings, applicability of rules, p. 939.
- arrest, p. 932.
- attachment, pp. 932, 933.
- attorneys, service of papers on, p. 903.
- bankruptcy, applicability of rules to, p. 938.
- chambers, hearings and orders in, p. 937.
- citation of rules, p. 940.
- citizenship cancelation proceedings, applicability of rules, p. 939.
- "civil action" includes law and equity, p. 901.
- clerk, p. 937.
 - books kept by, p. 937.
 - notice of orders or judgments, p. 937.
 - office kept open, p. 937.
 - powers generally, p. 937.
- commencement of action, p. 901.
- complaint, p. 904.
 - contents, pp. 904, 905.
 - filing constitutes commencement of action, p. 901.
 - fraudulent conveyances, p. 910.
 - interpleader, p. 911.
 - intervener's complaint, copy served, p. 912.
 - joinder of claims, p. 910.
 - motions making certain defenses to, p. 906.
 - perpetuation of testimony before action, p. 914.
 - pleadings allowed, p. 904.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- complaint,
 - prayer, p. 928.
 - served with summons, p. 902.
 - shareholder suing for corporation or other shareholders, p. 911.
 - successive remedies joined, p. 910.
- compromise, class action, p. 911.
- consolidation of actions, p. 922.
- constitutional questions, Attorney General notified, p. 912.
- construction of rules, p. 901.
- contempt, p. 923.
 - judgment for specific acts, disobedience, p. 933.
 - subpoena disobeyed, p. 924.
 - summary judgment, affidavits in bad faith, p. 929.
- continuance, pp. 909, 929.
 - amendment of pleadings, p. 909.
 - summary judgment application, p. 929.
- copyright cases, applicability of rules, p. 938.
- costs, p. 928.
 - appeal bonds, p. 934.
 - offer of judgment, effect on costs, p. 933.
 - order to eliminate unnecessary costs as between several parties, p. 911.
 - recovery in general, p. 927.
 - unnecessary matters in record on appeal, p. 936.
- counterclaim, p. 908.
 - additional parties brought in, p. 908.
 - against United States, p. 908.
 - amendment setting up, p. 908.
 - compulsory, p. 908.
 - default, p. 928.
 - different kind of relief, p. 908.
 - dismissal of complaint, p. 922.
 - exceeding opposing claim, p. 908.
 - interpleader, p. 911.
 - joinder of claims, p. 910.
 - matured or acquired after pleading, p. 908.
 - mistake in designation as defense or counterclaim, p. 905.
 - motions making certain defenses to, p. 906.
 - permissive, p. 908.
 - pleadings allowed, p. 904.
 - separate judgments, pp. 908, 927.
 - separate trials, pp. 908, 922.
 - summary judgment authorized, p. 928.
 - third party defendant asserting, pp. 908, 909.
 - time for replying to, p. 906.
- courts always open, p. 937.
- cross-claim, p. 908.
 - additional parties brought in, p. 908.
 - against coparty, p. 908.
 - default, p. 928.
 - interpleader, p. 911.
 - joinder of claims, p. 910.
 - motions making certain defenses to, p. 906.
 - pleadings allowed, p. 904.
 - separate judgments, p. 908.
 - separate trials, pp. 908, 922.
 - summary judgment authorized, p. 928.
 - third party defendant asserting, p. 908.
 - time for answering, p. 906.
- death of party, p. 912.
- declaratory judgments, p. 929.
 - existence of other remedy, effect, p. 929.
 - rules and statutes governing, p. 929.
 - speeding the proceedings, p. 929.
 - summary judgment authorized, p. 929.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- default, p. 928.
 - entry by clerk, pp. 928, 937.
 - failure to make discovery, p. 920.
 - setting aside, p. 928.
- default judgment, p. 928.
 - clerk entering, pp. 928, 937.
 - court entering, p. 928.
 - infant or incompetent person, p. 928.
 - setting aside, p. 928.
 - United States, against, p. 928.
- defenses and objections,
 - failure to state legal defense to claim, pp. 907, 908.
 - how presented, p. 907.
 - made at trial, what may be, pp. 907, 908.
 - preliminary hearings, p. 905.
 - removed actions, p. 939.
 - waiver, pp. 907, 908.
 - when presented, p. 906.
- demands, service and filing, p. 903.
- demurrers abolished, p. 904.
- deportation of Chinese, rules not applicable, p. 939.
- depositions before action, pp. 914, 915.
 - attorney appointed for persons not served, n. 914.
 - examination of witness, p. 914.
 - notice and service, p. 914.
 - order for taking, p. 914.
 - perpetuation by action, power of court not limited, p. 915.
 - persons before whom depositions may be taken, pp. 915, 917.
 - petition, p. 914.
 - use, p. 915.
- depositions pending action, p. 913.
 - attendance of witnesses, p. 913.
 - certification and filing by officer, p. 917.
 - copies furnished, p. 917.
 - effect of taking or using, p. 914.
 - errors and irregularities, effect, p. 917.
 - failure to respond to letters rogatory, p. 920.
 - motion to terminate, suspend, or limit examination, p. 916.
 - notice of filing, p. 917.
 - notice of taking by oral examination, p. 915.
 - oath of witness, p. 916.
 - objections, pp. 914, 916, 918.
 - order for taking, p. 915.
 - party failing to proceed, attend, or answer, pp. 917, 919, 920.
 - persons before whom depositions may be taken, pp. 915, 918.
 - rebuttal, p. 914.
 - record of examination, p. 916.
 - right to take, p. 913.
 - stipulations for taking, p. 915.
 - transcribed testimony submitted to witness, corrections, signing, p. 916.
 - use, p. 913.
 - witnesses, p. 924.
 - attendance and production of documents, p. 923.
 - examination and cross-examination, p. 913.
 - refusing to testify, p. 919.
- written interrogatories, pp. 916, 917.
 - answers taken and filed, p. 917.
 - notice, p. 917.
 - orders regulating, p. 917.
 - serving copies, p. 917.
- depositions pending appeal, p. 915.
 - examination of witness, p. 915.
 - motion, p. 915.
 - notice and service, p. 915.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- depositions pending appeal,
 - order for taking, p. 915.
 - persons before whom depositions may be taken, pp. 915, 917.
 - use, p. 915.
- deposits in court, p. 933.
- discovery by inspection, copying, or photographing of documents or property, p. 918.
 - failure to comply with order, p. 919.
- dismissal, p. 922.
 - class action, p. 912.
 - costs of previously dismissed action, p. 922.
 - counterclaim, cross-claim, or third party claim, p. 922.
 - failure to comply with order for discovery, p. 919.
 - failure to prosecute or comply with rules, p. 922.
 - voluntary, p. 921.
- District of Columbia, courts and laws included, p. 940.
- docket, p. 937.
 - judgment entered, p. 929.
- effective date of rules, p. 940.
- eminent domain proceedings, applicability of rules, p. 939.
- equity and law united, rules apply to both, p. 901.
- evidence, p. 922.
 - accountant's statement of accounts, p. 927.
 - admissibility in general, p. 922.
 - default judgment, proof required, p. 928.
 - master's findings in jury case, use as evidence, p. 927.
 - motions, evidence on, p. 923.
 - official record, proof, p. 923.
 - authentication of copy, p. 923.
 - lack of record, how shown, p. 923.
 - other proof, p. 923.
 - pre-trial conference to plan, p. 909.
 - sufficiency, motion attacking, p. 922.
 - sufficiency to support court's findings, p. 926.
 - summary judgments, proof required, pp. 928, 929.
- exceptions to pleadings for insufficiency abolished, p. 904.
- exceptions to rulings, p. 924.
- executions, p. 933.
 - clerk issuing, p. 937.
 - minimum time for issuance, p. 930.
 - possession, judgment for, p. 933.
 - proceedings in aid of, p. 933.
 - public officers, against certain, p. 933.
- filing of papers, p. 903.
- findings by court, pp. 925, 926.
 - amendment or additional, pp. 926, 930.
 - stay of proceedings, p. 931.
 - effect, pp. 925, 926.
 - objections, p. 926.
 - requests unnecessary, p. 926.
- findings by master, p. 927.
 - adoption by court, effect, p. 925.
- forfeiture proceedings, applicability of rules, p. 938.
- forms, purpose of, p. 940.
- garnishment, p. 932.
- habeas corpus proceedings, applicability of rules, p. 938.
- harmless error, p. 930.
- hearings, place, p. 937.
- injunctions, p. 932.
 - employer and employee, p. 932.
 - form and scope, p. 932.
 - interpleader cases, p. 932.
 - notice before granting, exception, p. 932.
 - requisites and duration of temporary restraining order granted without notice, p. 932.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- injunctions,
 - security, p. 932.
 - stay, pp. 930, 931.
- instructions to jury, p. 925.
 - interrogatories or special verdict, p. 925.
 - objections, p. 925.
 - requests, p. 925.
- interpleader, pp. 911, 932.
- interrogatories to parties, p. 918.
 - answers signed and served, p. 918.
 - failure to answer, pp. 919, 920.
 - objections, p. 918.
 - propounding, p. 918.
- judge dead or disabled after verdict or findings, p. 931.
- judgment, pp. 927, 928.
 - correction of clerical errors, p. 930.
 - definition, p. 927.
 - docket entries, pp. 929, 930, 937, 938.
 - effective date, p. 930.
 - entry by clerk, p. 929.
 - interrogatories or special verdict, p. 929.
 - nonparties, enforcing obedience to orders for or against, p. 934.
 - notice of orders and judgments, p. 937.
 - offer of judgment, p. 933.
 - service and filing, p. 903.
 - order book, p. 938.
 - prayer in pleadings, p. 928.
 - proceedings in aid of, p. 933.
 - recitals omitted, p. 927.
 - relief from party's mistake or excusable neglect, p. 930.
 - stay of proceedings, pp. 930, 931.
 - separate claims determined, separate judgments on, pp. 927, 928.
 - setting aside on granting new trial, p. 930.
 - special relief, form settled by judge, pp. 929, 930.
 - specific acts, p. 933.
 - surety on appeal bond, against, p. 935.
- jurisdiction not affected by rules, p. 940.
- jurors, p. 924.
 - alternates, p. 924.
 - additional challenge allowed, p. 924.
 - discharge on retirement of jury, p. 924.
 - use authorized, p. 924.
 - examination of prospective jurors, p. 924.
 - stipulations as to number used or to concur in verdict, p. 924.
- jury trial, pp. 920, 921.
 - advisory jury, p. 921.
 - consent to, in certain cases against United States, p. 921.
 - declaratory judgment cases, p. 929.
 - default cases, p. 928.
 - demand for, pp. 920, 921.
 - docket entries, pp. 937, 938.
 - issues included in demand, exception, p. 921.
 - issues not specified for jury, p. 921.
 - master's findings, use at trial, p. 927.
 - reference to master, when made, p. 926.
 - removed actions, pp. 939, 940.
 - right preserved, p. 920.
 - waiver by failure to demand, p. 921.
 - withdrawal of demand, p. 921.
- law and equity united, rules apply to both, p. 901.
- Longshoremen's and Harbor Workers' Compensation Act, applicability of rules, p. 939.
- lunacy proceedings, rules not applicable, p. 938.
- mailing copies of papers, pp. 903, 904.
- mandamus abolished, substitute, p. 939.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- masters, pp. 926, 927.
 - appointment and references, p. 926.
 - default cases, p. 928.
 - compensation, p. 926.
 - powers, p. 926.
 - proceedings before, pp. 926, 927.
 - report and findings, pp. 925-927.
- medical examination of party, pp. 918, 919.
 - application and order for, p. 918.
 - failure to comply with order, pp. 919, 920.
 - report of findings, p. 919.
 - waiver of privileges, p. 919.
- motions, pp. 903, 904, 906, 907.
 - bill of particulars, p. 907.
 - consolidation of motions, p. 907.
 - depositions, pp. 915-918.
 - pending appeal, p. 915.
 - suppression, p. 918.
 - termination or limitation of examination, p. 916.
 - direction of verdict, p. 925.
 - decision after jury renders verdict, p. 925.
 - effect of motion, p. 925.
 - stay of proceedings, pp. 930, 931.
 - when made, p. 925.
 - evidence insufficient to sustain claim, p. 922.
 - evidence on motion, p. 922.
 - failure to state claim on which relief can be granted, p. 907.
 - filing and service on opponent, p. 903.
 - findings by court, amendment or additions, pp. 925, 926.
 - hearings on, p. 937.
 - improper venue, p. 907.
 - insufficiency of process, p. 907.
 - insufficiency of service of process, p. 907.
 - intervention, p. 912.
 - judgment, pp. 907, 929, 930.
 - correction of, p. 930.
 - on the pleadings, p. 907.
 - summary, pp. 928, 929.
 - lack of jurisdiction over person, p. 907.
 - lack of jurisdiction over subject-matter, pp. 907, 908.
 - medical examination of party, pp. 918, 919.
 - more definite statement, p. 907.
 - new trial, p. 930.
 - grounds, p. 930.
 - joined with motion for directed verdict, p. 925.
 - joined with motion to amend court's findings, p. 926.
 - judge dead or disabled, another judge granting, p. 931.
 - stay of proceedings, p. 931.
 - sua sponte, p. 930.
 - taking additional testimony and making findings thereon, p. 930.
 - time for motion, p. 930.
 - time for serving affidavits, p. 930.
 - order of making, p. 907.
 - quash subpoena, p. 923.
 - restraining order granted without notice, dissolution or modification of, p. 932.
 - strike redundant, immaterial, impertinent, or scandalous matter from pleading, p. 907.
 - substitute for scire facias and mandamus, p. 939.
 - time of serving motions and affidavits thereon, p. 904.
- National Labor Relations Board, enforcement of orders of, p. 939.
- naturalization proceedings, applicability of rules, p. 938.
- ne exeat, p. 932.
- new trial, proceedings at, nonjury cases, p. 930.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- notice, pp. 903, 904.
 - appeal, notice of, p. 934
 - class action, dismissal or compromise of, p. 912.
 - costs, taxing, p. 928.
 - default judgment against infant or incompetent person, p. 928.
 - depositions before action, p. 914.
 - depositions pending action, pp. 915, 916.
 - foreign country, taken in, p. 915.
 - written interrogatories, taken on, pp. 917, 918.
 - depositions pending appeal, p. 915.
 - deposits in court, p. 933
 - extending time to file record on appeal and docket cause, p. 934.
 - injunction hearing, p. 932.
 - injunction issued, p. 932.
 - master's hearings, pp. 926, 927.
 - master's report, p. 927
 - medical examination of party, pp. 918, 919.
 - motion for new trial on newly-discovered evidence, p. 930.
 - offer of judgment, p. 933.
 - orders or judgments, notice mailed by clerk, p. 937.
 - service and filing, p. 903.
 - substitution of parties, p. 912.
 - time of serving for motions, p. 904.
 - voluntary dismissal, p. 921.
- numerous defendants, serving pleadings other than complaint, p. 903.
- oath or affirmation under rules, p. 922.
- order book, p. 938.
- orders, service of copies, p. 903.
- parties, pp. 910, 911.
 - adding and dropping, p. 911.
 - capacity to sue and be sued, p. 910.
 - class actions, pp. 911, 912.
 - incompetent persons, p. 910.
 - default, proceedings after, p. 928.
 - infants, p. 910.
 - default, proceedings after, p. 928.
 - interpleader, p. 911.
 - injunction, p. 932.
 - intervention, p. 912.
 - misjoinder not ground for dismissal of suit, p. 911.
 - necessary joinder, p. 910.
 - nonparties, enforcing obedience to orders for or against, p. 934.
 - numerous, representation of, p. 911.
 - omission of proper, but not necessary, parties, allegations and procedure, p. 911.
 - permissive joinder, p. 911.
 - real party in interest, p. 910.
 - separate trials in case of several parties, p. 911.
 - severance of claims, p. 911.
 - shareholder suing for corporation or other shareholders, pp. 911, 912.
 - substitution, pp. 912, 913.
 - death, p. 912.
 - depositions previously taken, use, p. 914.
 - incompetency, p. 912.
 - public officers, death or separation from office, p. 913.
 - transfer of interest, p. 912.
 - trustee suing without beneficiary, p. 910.
- patent cases, stay of proceedings, p. 931.
- petroleum control boards, review of orders of, p. 939.
- pleadings, p. 904.
 - adoption by reference, p. 906.
 - affirmative defenses, p. 905.
 - alternative claims or defenses, p. 905.
 - averments to be simple, concise, and direct, p. 905.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- pleadings,
 - capacity, p. 905.
 - captions, p. 906.
 - condition of mind, p. 905.
 - condition precedent, pp. 905, 906.
 - construction, p. 905.
 - defenses alleged, p. 905.
 - effect of failure to deny, p. 905.
 - enumeration of pleadings allowed, p. 904.
 - exhibits, p. 906.
 - filing, numbering, and docketing, pp. 937, 938.
 - form of denials, p. 905.
 - fraud, p. 905.
 - inconsistent claims or defenses, p. 905.
 - joinder of causes and defenses, p. 905.
 - judgment, how pleaded, p. 905.
 - legal existence of party, p. 905.
 - limiting and simplifying issues at pre-trial conference, p. 909.
 - mistake, p. 905.
 - numbering paragraphs, p. 906.
 - official document or act, p. 906.
 - place alleged, p. 906.
 - prayer for relief, pp. 904, 905.
 - separate statement of counts and defenses, p. 906.
 - shams stricken, p. 906.
 - signature and address of attorney or party, p. 906.
 - special damage, p. 906.
 - statement of claim, p. 904.
 - statement of jurisdiction, p. 904.
 - technical forms not required, p. 905.
 - time alleged, p. 906.
 - verification, p. 906.
- pleas abolished, p. 904.
- pre-trial conferences, p. 909.
- probate proceedings, rules not applicable, p. 938.
- process, pp. 901-903.
 - amendment, p. 903.
 - by whom served, p. 902.
 - form of summons, p. 901.
 - issuance of summons, pp. 901, 937.
 - mailing copies, p. 902.
 - perpetuation of testimony before action, p. 914.
 - personal service of summons and complaint, how made, pp. 901-903.
 - publication, p. 902.
 - return, p. 903.
- production of documents, p. 918.
 - admission of genuineness, pp. 919, 920.
 - failure to comply with order, p. 919.
- quo warranto proceedings, applicability of rules, pp. 938, 939.
- receiverships, p. 933.
 - stay of proceedings, p. 930.
- removal of causes, p. 939.
- replevin, p. 932.
- reply, p. 904.
 - containing objection to failure to state defense to claim, p. 907.
- time for serving, p. 907.
- res judicata, dismissal, pp. 921, 922.
- rules by district courts, p. 940.
- scire facias abolished, substitute, p. 939.
- scope of rules, p. 901.
- Secretary of Agriculture, review of orders of, p. 939.
- Secretary of Commerce, review of orders of, p. 939.
- sequestration, pp. 932, 933.
- service of papers, how made, p. 903.
- specific performance, enforcement of judgment, p. 933.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- state laws, pp. 932, 933.
 - attachment and garnishment, p. 932.
 - District of Columbia included, p. 940.
 - seizure and arrest, p. 932.
 - proceedings in aid of judgment or execution, p. 933.
 - replevin, pp. 932, 933.
 - statutes and judicial decisions construing them, p. 940.
 - stay of proceedings, p. 931.
- stay of proceedings to enforce judgment, pp. 930, 931.
- stenographer, p. 938.
 - appointment and compensation, p. 938.
 - transcripts furnished, p. 938.
- subpoena, pp. 923, 924.
 - attendance of witnesses, form, issuance, p. 923.
 - depositions, pp. 923, 924.
 - disobedience, contempt, p. 924.
 - production of documents, p. 923.
 - service, p. 923.
- summary judgment, pp. 928, 929.
 - affidavits and testimony, p. 929.
 - authorized for claimant, pp. 928, 929.
 - authorized for defending party, p. 929.
 - bad faith penalized, p. 929.
 - motion and proceedings thereon, p. 929.
- terms of court, effect of expiration, p. 904.
- third party practice, pp. 904, 908, 909.
 - default, p. 928.
 - defendant bringing in third party, p. 908.
 - joinder of claims, p. 910.
 - plaintiff bringing in third party, p. 909.
 - separate trials, p. 922.
- time, pp. 903, 904.
 - additional time after service by mail, p. 904.
 - computation, pp. 903, 904.
 - effect of expiration of term of court, p. 904.
 - enlargement, p. 904.
 - serving motions, affidavits, and notices, p. 904.
- trial,
 - conducted in open court when merits tried, p. 937.
 - depositions used at trial, pp. 913, 914.
 - direction of verdict, p. 925.
 - joint trial of two or more actions, p. 922.
 - reception of evidence in general, p. 922.
 - record of excluded evidence, p. 922.
 - separate trials in same action, pp. 911, 922.
- trial by judge, pp. 921, 925, 926.
 - docket entries, p. 938.
 - findings, pp. 925, 926.
 - issues not specified for jury, p. 921.
 - motion for new trial, proceedings on, p. 930.
 - sufficiency of evidence to support findings, p. 926.
- trial calendar, p. 921.
 - declaratory judgment cases advanced, p. 929.
- United States, p. 910.
 - costs and expenses, pp. 920, 928.
 - counterclaim against, p. 908.
 - default judgment, p. 928.
 - injunctions, security, p. 932.
 - jury trial in certain cases, p. 921.
 - stay of proceedings, p. 931.
 - suing for use of party, p. 910.
- venue, not affected by rules, p. 940.
- verdict, pp. 924, 925.
 - interrogatories to jury, p. 925.
 - judgment on, pp. 929, 930.

References are to Forms

RULES OF CIVIL PROCEDURE, DISTRICT COURTS—Continued.

- verdict,
 - number of jurors concurring, p. 924.
 - special, pp. 924, 925.
 - judgment on, p. 929.
- witnesses, p. 922.
 - attendance and production of documents, p. 923.
 - competency, p. 922.
 - contempt, p. 924.
 - contradiction and impeachment, p. 922.
 - master's hearings, p. 927.
 - oath or affirmation, p. 922.
 - scope of examination, p. 922.
- writ of assistance, p. 934.

RULES OF CRIMINAL PROCEDURE,

- appeals,
 - dismissal, motion for, time of, p. 942.
 - finer, order to prevent dissipation of assets, p. 942.
 - local rules of appellate court, p. 943.
 - mandates, appellate court may prescribe rules, p. 943.
 - motions relating to prosecution of appeal, time for, p. 942.
 - notice of appeal, p. 942.
 - appellate court, duplicate to, p. 942.
 - contents, p. 942.
 - trial judge, notification by clerk, p. 943.
 - United States Attorney, service on, p. 942.
 - petitions for allowance abolished, p. 942.
 - record on appeal,
 - amplification of, motion for, time, p. 943.
 - assignment of errors,
 - direction to file, p. 943.
 - time for filing, p. 943.
 - bills of exceptions,
 - form of, p. 943.
 - procedure on appeal without, p. 943.
 - time for filing, p. 943.
 - clerk's record of proceeding, appeal on, p. 943.
 - correction of, motion for, time for, p. 943.
 - direction by court for making, p. 943.
 - reduction of record, motion for, time of, p. 943.
 - transcript of testimony, directions for making available, p. 943.
 - transmitting to appellate court, p. 943.
 - rehearings, appellate court may prescribe rules, p. 943.
 - setting for argument,
 - preference of criminal over civil cases, p. 943.
 - time for, p. 943.
 - supersedeas, p. 942.
 - bond, p. 942.
 - supervision of appellate court, p. 942.
 - time for making, p. 942.
- "appellate court" defined, p. 943.
- arrest of judgment, motion for,
 - delay of sentence, p. 941.
 - time for making, p. 942.
- bail,
 - appeal, motions during, time for, p. 942.
 - appeal pending, when permitted, p. 942.
- certiorari, time for petition to Supreme Court, p. 943.
- cost bonds, appellate courts may prescribe rules, p. 943.
- definitions of terms used in rules, p. 943.
- finer, appeals, effect of, p. 942.
- guilty, plea of, motion to withdraw,
 - delay of sentence, p. 941.
 - prompt determination of, p. 941.
 - time for making, p. 942.

References are to Form*

RULES OF CRIMINAL PROCEDURE—Continued.

- holidays excluded in computing time, p. 943.
- motions after verdict to be determined promptly, p. 941.
- new trial, motion for,
 - delay of sentence, p. 941.
 - time of making, p. 942.
 - capital cases, p. 942.
 - effect of appeal, p. 942.
- sentence, p. 941.
 - appeal, stay of, p. 942.
 - clerk to enter, p. 941.
 - delay, grounds for, p. 941.
 - signed by judge, p. 941.
- Sundays excluded in computing time, p. 943.
- "trial court" defined, p. 943.
- "trial judge" defined, p. 943.

RULES OF SUPREME COURT,

- abrogation of prior rules, p. 894.
- adjournment of term, advance notice of, p. 894.
- appeals, pp. 893, 894.
 - citation to appellee, pp. 880, 890, 893.
 - evidence taken in Supreme Court, p. 884.
 - parties, p. 894.
 - petition and allowance, pp. 880, 881, 890, 893.
- assignment of errors, pp. 880, 881, 883, 887, 893.
- attorneys and counsellors, p. 878.
 - admission to practice, p. 878.
 - disbarment, p. 878.
 - law clerks and secretaries employed by judges, p. 878.
- bill of exceptions, p. 880.
- briefs, pp. 879, 887.
 - amicus curiae, p. 887.
 - certiorari application on, pp. 890, 892.
 - failure to file, pp. 886, 887.
 - printing, pp. 886, 887.
- certiorari, pp. 890-892.
 - before judgment below, p. 892.
 - brief on application for review, pp. 890-892.
 - Court of Claims, p. 892.
 - grounds for review by, p. 891.
 - notice of application for review, p. 891.
 - notice of denial of application for, p. 889.
 - objections to, p. 879.
 - order granting review, p. 893.
 - petition for review by, p. 890.
 - rules governing appeals, application to certiorari, p. 893.
- clerk, p. 878.
- costs, p. 889.
 - awarding, p. 888.
 - security, pp. 890, 893.
 - table of fees, p. 889.
- death of party, p. 884.
- docketing and calling cases, pp. 881, 882, 885.
 - advancement of cases, p. 885.
 - counsel absent or not ready, pp. 885, 886.
 - joinder, p. 885.
 - original actions, p. 879.
 - summary docket, pp. 879, 886, 888.
- effective date of revised rules, p. 877.
- findings of fact by Court of Claims, p. 892.
- habeas corpus, custody of prisoner pending review, p. 893.
- instructions, exceptions to, p. 880.
- interest and damages awarded, p. 888.
- jurisdictional statements, pp. 881, 882, 893.
 - printing, p. 882.

References are to Forms

RULES OF SUPREME COURT—Continued.

- library, p. 878.
- mandate, p. 889.
 - costs included, p. 888.
 - denial of application for certiorari, no mandate, p. 889.
 - dismissal of appeal or certiorari, issuance, p. 888.
 - voluntary dismissal, no mandate unless ordered, p. 890.
- models, diagrams, and exhibits of material, p. 884.
- motions and petitions, pp. 879, 880.
 - printing, p. 886.
- objections to evidence in equity and admiralty cases, p. 884.
- opinion of lower court, pp. 880, 887, 890, 892.
- opinions of Supreme Court, filing, printing, and binding, p. 888.
- oral argument, p. 888.
 - failure of appellee to file brief, p. 887.
 - motions on, pp. 879, 889.
 - submission on briefs without oral argument, p. 886.
- original actions, p. 879.
- original papers transmitted to Supreme Court, pp. 880, 882.
- penalty imposed, p. 888.
- printing records, pp. 882, 892.
 - paper and type specifications, p. 886.
- procedendo to issue on dismissal, p. 888.
- process, p. 879.
- questions certified for decision, p. 890.
 - Court of Claims, p. 892.
 - requiring entire record for complete review, p. 890.
- rehearing, p. 889.
- Saturday, no argument or open session on, p. 894.
- supersedeas, pp. 890, 893.
- transcript of record, pp. 880, 882, 890, 892, 893.
 - supplemental, p. 884.
 - time for filing, pp. 881, 891.
- translations, pp. 883, 884.
- voluntary dismissal, p. 890.
- writ of error, substitute for, p. 893.

S

SALES,

- act of God, loss by, answer, 276.
- commissions, suits for; accounting, reference to special master, interlocutory judgment of reference, 586.
- consideration, 254.
 - destruction of goods before delivery, answer, 254.
 - failure of title to property sold, answer, 254.
- damages, allegation of special damages, 126.
- election of remedies, answer, 292.
- liability for loss limited by contract, answer, 275.
- rescission by agreement, answer, 288.
- statute of frauds, violation of, answer, 270.

SEAMEN,

See NEGLIGENCE.

SEARCH WARRANTS,

See CRIMINAL PROCEDURE.

SECRETARY OF AGRICULTURE,

- cotton quotas, orders for, enjoining enforcement of,
 - answer of United States in intervention, 1020.
 - answer to complaint for injunction, 1017.
 - complaint for injunction, 1016.
 - intervention by United States,
 - motion for leave, 1018.
 - order granting leave to intervene, 1019.
- milk, distribution of, injunction, complaint to enjoin violation of orders for, 1015.

References are to Forms

SECURITIES AND EXCHANGE COMMISSION,

- confidential treatment, review of order denying.
 - notice of petition for, 978.
 - order granting leave to file petition for review, 979.
 - petition for, 977.
 - service of notice, acknowledgment of, 978.
- perjury, indictment for, 734.
 - demurrer to, 757.
 - quash, motion to, 754.
- stop orders, review,
 - notice of petition for, 978.
 - order granting petition for, 976.
 - petition for, 975.
- unregistered securities, sale of, injunction, 980, 981.
 - answer to complaint, 981.
 - complaint, 980.

SECURITY FOR COSTS,

- bond, 207.
- motion, 205.
- order for, 206.

SERVICE OF PROCESS,

See PROCESS.

SLANDER,

See LIBEL.

- interrogatories to parties, 455.
- privilege of slander, answer of, 290.
- truth of slander, answer of, 289.

SMUGGLING,

See CRIMINAL PROCEDURE; INDICTMENTS.

SPECIFIC PERFORMANCE,

- land, contract to convey, 88.
- judgment, 624.

STATUTE OF FRAUDS,

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS,

See LIMITATION OF ACTIONS.

STATUTES,

See UNCONSTITUTIONALITY OF STATUTE.

STATUTORY TRUSTEE,

See TRUSTEES.

STOCKHOLDERS,

See CORPORATIONS.

SUBCONTRACTORS,

- action under Heard Act, 100.
- intervention under Heard Act for labor furnished,
 - complaint or answer, 354.
 - motion for, 352.
 - order for, 353.
- labor and materials, suits for, 100.

SUBPOENAS,

See PROCESS.

- bankruptcy,
 - bankrupt, 810.
 - witnesses, 846.
- criminal cases, service, return of, 765.

References are to Forms

SUBPOENAS—Continued.

- documents, production of,
 - depositions, upon the taking of,
 - notice of motion for issuance of subpoena, 559.
 - order for issuance of subpoena, 560.
- quashing subpoena,
 - notice of motion, 556.
 - order denying motion, 558.
 - order for, 557.
- trial of cause, for use as evidence at, form of, 555.
- duces tecum, form of, 555.
- form of, 554, 555.
- return of service, form of, 554, 555, 765.
- witnesses, attendance at trial, 554, 765.

SUMMONS,

See PROCESS.

SUPPLEMENTAL PLEADINGS,

See AMENDED AND SUPPLEMENTAL PLEADINGS.

SUPREME COURT RULES,

See RULES OF SUPREME COURT.

SURETIES,

- release by alteration of contract, answer, 277, 291.

T

TAXES,

- collection, suit for, 108.
- collector, suits against for refund, 109.
- indictment,
 - intoxicating liquor, failure to pay taxes upon, 732, 735.
 - smuggling, 737, 738.
 - goods, wares or merchandise, 737.
 - opium, 738.
 - stamp tax,
 - failure to display, 731.
 - failure to pay, 731, 732.
- refund, suits for, 109, 901.
- review by Board of Tax Appeals, deficiency, redetermination of,
 - answer of commissioner, 916.
 - judgment of no deficiency, 917.
 - petition for, 915.
 - reconsideration of board's decision,
 - motion for, 918.
 - order denying motion for, 919.
- review by Circuit Court of Appeals, deficiency, redetermination of,
 - error, assignment of, 920.
 - judgment upon, 924.
 - notice of petition for, 921.
 - petition for, 920, 922.
 - precipe for transcript of record, 923.
- review by Supreme Court, deficiency, redetermination of, 925.
- certiorari, order for writ, 925.

TEMPORARY INJUNCTION,

See RESTRAINING ORDERS.

TEMPORARY RESTRAINING ORDERS,

See RESTRAINING ORDERS.

THIRD PARTY PRACTICE,

See INTERVENTION; PARTIES TO ACTIONS.

References are to Forms

TORT ACTION,

See NEGLIGENCE.

TRADE COMMISSION,

See FEDERAL TRADE COMMISSION.

TRADE-MARK OR TRADE NAME,

illegal use, injunction, 103.

order for, 147(2).

TRIAL BY JURY,

See TRIAL OF CIVIL ACTIONS.

TRIAL OF CIVIL ACTIONS,

See JUDGMENTS; MASTERS.

- consolidation of actions,
 - notice of motion for, 547.
 - order for, 548.

- consolidation of issues,
 - notice of motion for, 550.
 - order for, 551.

- court, trial by,
 - consent to, notwithstanding demand for jury, 517, 518.
 - findings of fact and conclusions of law, 572.
 - amendment, notice of motion, 573.
 - amendment, order for, 574.
 - judgment on, 617.

- judgment, amendment,
 - notice of motion for, 573.
 - order for, 574.

- jury, advisory,
 - motion for, 521.
 - order for, 522, 523.

- jury by consent, order for, 523.

- jury, demand for, withdrawal, 517.

- statutory court of three judges,
 - judgment by, 636.
 - order designating, 525.

- stipulation for notwithstanding demand for jury, 518.

- dismissal of actions,

- amount in controversy less than three thousand dollars,
 - motion for, 218, 220.
 - notice of motion, 218.

- cause of action, failure to state,
 - motion for, 218, 541.
 - notice of motion, 218.
 - order for, 219, 382.

- constitutions or laws of United States, failure to allege action under,
 - judgment of dismissal, 636.
 - motion for, 218, 541.
 - notice of motion, 218.

- diversity of citizenship, failure of, motion for, 220.

- injunction, preliminary, order for, 146, 542.

- jurisdiction, failure of,
 - motion for, 218, 220.
 - notice of motion, 218.

- physical examination, refusal to submit to, notice of motion, 494.

- pretrial conference,
 - notice of motion to dismiss for failure to appear at, 539.
 - order of dismissal for failure to appear at, 540.

- process, insufficiency of,
 - motion for, 218, 220.
 - notice of motion, 218.

References are to Forms

TRIAL OF CIVIL ACTIONS—Continued.

- dismissal of actions,
 - prosecution, want of, 537-540.
 - notice of motion, 537, 539.
 - order for, 538, 540.
 - venue, failure of, motion for, 220.
 - voluntary, 529.
 - costs, motion to require payment, 543.
 - costs, order requiring payment of, 544.
 - notice of, before service of answer, 528.
 - notice of motion for leave to dismiss class action, 533.
 - notice of motion to dismiss, 530.
 - notice of proposed dismissal of class action, 531.
 - order denying motion to dismiss after service of answer, 536.
 - order dismissing class action, 534.
 - order for dismissal after service of answer, 535.
 - order for service of notice of proposed dismissal of class action, 532.
 - stipulation of, 529.
- judgments, 610-662.
- jury, trial by,
 - consent to in actions not triable by jury as matter of right, orders for, 523.
 - demand for, 510-512.
 - actions not triable by jury,
 - motion to strike demand, 515.
 - order striking demand, 516.
 - advisory jury, 521-523.
 - motion for, 521.
 - order for, 522, 523.
 - consent for trial by court notwithstanding demand, 517, 518.
 - service of demand,
 - notice of motion for jury notwithstanding such failure, 519.
 - order for jury notwithstanding failure, 520.
 - time for, notice of motion of demand after expiration of, 513, 519.
 - time for, order permitting demand after expiration of time for, 514.
 - withdrawal of demand, consent to, 517.
 - instructions to, 564.
 - requests for, 563.
 - verdicts, special, instruction to return, 564.
 - issues, 510-512.
 - certain specified issues, 511.
 - specification of additional issues, demand for, 512.
 - upon all, demand for, 510.
 - stipulation for jury of less than twelve, 524.
 - verdicts,
 - directed verdict,
 - disagreement of jury, notice of motion for, 571.
 - disagreement of jury, order for, 567.
 - judgment on, 613, 614, 616.
 - notice of motion for, 566, 571.
 - order denying motion for, 570.
 - order for, 567, 569.
 - judgment, order for notwithstanding verdict, 569.
 - judgments on, 611, 612, 615, 616.
 - setting aside,
 - motion to, 566.
 - notice of motion to, 566.
 - order denying motion to, 570.
 - order setting aside and directing judgment, 569.
 - order setting aside and granting new trial, 568.
 - special, 565.
 - instruction for jury to return, 564.
 - judgment on, 615.

References are to Forms

TRIAL OF CIVIL ACTIONS—Continued.

- new trial, motion for, 566, 657, 658.
 - evidence,
 - erroneous exclusion of, 657.
 - erroneous introduction of, 657.
 - newly discovered, 658.
 - order granting, 659.
 - instruction for directed verdict,
 - erroneous, 657.
 - refusal of, 657.
 - instructions, giving erroneous, 657.
 - instructions, refusal of, 657.
 - issues, error in submitting to jury, 657.
 - misconduct of juror, 657.
 - notice of motion for, 566, 657, 658.
 - order granting, 568, 659.
 - order overruling motion, 660.
 - verdict contrary to law, 657.
 - verdict, excessiveness, 657.
 - verdict not sustained by evidence, 657.
- reference to masters, 580-602.
- separation of issues for trial of, notice of motion for, 549.
- subpoena,
 - documents, production of, 555.
 - quashing subpoena for,
 - notice of motion, 556.
 - order denying motion to quash, 558.
 - order for, 557.
 - duces tecum, 555.
 - form of, 554, 555.
 - witness, attendance of, 554, 555.
 - service, form of return, 554, 555.

TRUSTEES,

- See BANKRUPTCY; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.
- capacity to sue, allegation of, 120.
- designation, caption, 5-7, 9.
 - statutory, 7.
 - use of another, 6, 7.

TUCKER ACT,

- actions under, 75, 96.

U

ULTRA VIRES,

See CORPORATIONS.

UNCONSTITUTIONALITY OF STATUTE,

- answer of, 282.
- intervention by United States,
 - answer of United States in intervention, 368, 1020.
 - certification of notice to Attorney General, 361, 364.
 - motion for, 367, 1018.
 - notice to Attorney General, 360, 362, 365.
 - order of certification of notice to Attorney General, 363, 366.
 - order permitting intervention, 360, 369, 1019.
 - trial, notice to Attorney General, 362.

UNFAIR COMPETITION,

- copyright infringement, 93.
- Federal Trade Commission, proceeding before,
 - answer to complaint, 951.
 - cease and desist orders, 955.
 - answer to application to enforce, 957.
 - application for enforcement, 956.

References are to Forms

UNFAIR COMPETITION—Continued.

- Federal Trade Commission, proceeding before, complaint, 950.
 - supplemental complaint, motion for, 953.
 - order for, 954.
- examiner, order appointing, 952.
- notice of complaint, 950.
- review of cease and desist orders, order allowing petition for, 959.
- petition for, 958.
- patent infringement, 92, 116.
- trade-mark or name, unlawful use, 103.
- order, 147 (4).

UNITED STATES,

See UNCONSTITUTIONALITY OF STATUTE.

- actions,
 - by officer of, 74.
 - in name of, 73.
 - under Constitution of, 69.
 - under laws of, 70, 71.
 - under treaties of, 72.
- agency of,
 - return of service of process upon, 22, 23.
 - service of process upon, 22, 23.
- board or commission, validity of order, notice to Attorney General of answer attacking, 363.
- citizenship,
 - cancellation for fraud, suit for, 112.
 - cancellation for residence abroad, suit for, 111.
- claims against,
 - actions in District Court,
 - contract, breach of, suit for, 96.
 - jurisdiction, allegations of, 75.
 - tax refunds, actions for, 109.
 - Tucker Act, actions under, 75, 96.
 - war risk insurance, suits for, 110.
 - Court of Claims, actions in,
 - answers,
 - plea of jurisdiction, 904.
 - traverse, 906.
 - certiorari, petition for writ of, 908.
 - contract, breach of, petition for, 900.
 - demurrer to petition, 903.
 - government documents, motion for production of, 905.
 - judgment upon, 907.
 - motion for call, 905.
 - patent infringement, suit for, 902.
 - tax refunds, petition for, 901.
 - return of service of process upon, 21-23.
 - service of process upon, 21-23.
- intervention, constitutionality of statute in issue, 360-369, 1018-1020.
 - answer of United States, 368, 1020.
 - motion of United States, 367, 1018.
 - notice to Attorney General, 360, 362, 365.
 - certification of, 361, 364.
 - order for notice to Attorney General, 363, 364, 366.
 - order permitting, 360, 369, 1019.
 - petition of United States, 368.
- taxes, suits for collection, 108.

UNITED STATES BOARD OF TAX APPEALS,

See TAXES.

USURY,

- answer of, 278.

References are to Forms

V

VENUE,

objections to,
motion, 218, 220.
notice of motion, 218, 220.

VERDICTS,

See TRIAL OF CIVIL ACTIONS.

W

WAIVER,

contracts, 285, 286.
breach of, answer, 285.
performance prevented by plaintiff, answer, 286.

WARRANTS,

See PROCESS.

WILFULNESS,

See NEGLIGENCE.

WRITS,

See ATTACHMENT; CERTIORARI; HABEAS CORPUS; NE EXEAT; SUBPOENAS.

WRONGFUL DEATH,

Lord Campbell's Act, suits under, 115.



